

7-26-2010

Asbury Park v. Greenbriar Estate Homeowners' Assoc Clerk's Record v. 3 Dckt. 37556

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LAW CLERK

(VOLUME 3)

IN THE
SUPREME COURT
OF THE
STATE OF IDAHO

ASBURY PARK, LLC., an Idaho limited liability company; and JOHN ESPOSITO, an individual,

**Plaintiffs-Counterdefendants-
Respondents-Cross-Appellants,**

-VS-

GREENBRIAR ESTATES HOMEOWNER'S ASSOCIATION, INC., an Idaho non-profit corporation,

**Defendant-Counterclaimant-
Appellant-Cross-Respondent,
And**

DEBRA HOBBS a/k/a DEBBIE HOBBS, an individual d/b/a ACTION ASSOCIATION MANAGEMENT COMPANY,

Defendant-Counterclaimants.

Appealed from the District of the Third Judicial District for the State of Idaho, in and for Canyon County

Honorable THOMAS J. RYAN, District Judge

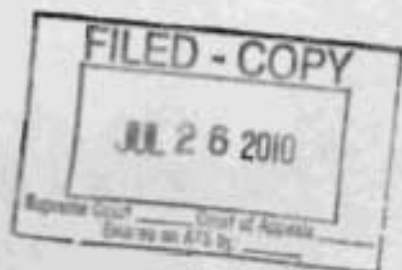
Michelle R. Points
HAWLEY TROXELL ENNIS & HAWLEY, LLP.

Attorney for Appellant

David M. Penny
COSHO HUMPHREY, LLP.

Attorney for Respondents

37556



[illegible]

Attorney for Respondents

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F I L E D
A.M. 1:10 P.M.

OCT 05 2009

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF NORMAN HOLM

NORMAN HOLM, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. I have been the Director of the Planning and Zoning Department for the City of Nampa since April 3, 1978. I have a general recollection of the relevant period of time

AFFIDAVIT OF NORMAN HOLM - 1

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that John Esposito and his entity Asbury Park, LLC obtained preliminary and final plat approvals for the Greenbriar Estates Subdivision and related events that transpired related to the development.

3. As part of the process of presenting a preliminary plat and a final plat, the developer is requested to designate those areas in the plat that are going to be common areas and/or areas to be owned and maintained by the homeowner's association.

4. Mr. Esposito first submitted the preliminary plat for Greenbriar Estates Subdivision on July 30, 2004.

5. Review of the preliminary plat was on the Planning and Zoning Commission ("the Commission") meeting held on August 24, 2004, at which I was present. The Commission approved the preliminary plat, subject to numerous conditions, including that Plat note number 15 needed to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to those lots. It appeared that the lot titled "RV Park" was common area, Plat note 13 only stated, "[a]ll common lots are to be owned and maintained by the homeowner's association" but did not specify which lots were common lots. A true and correct copy of the August 24, 2004 Commission Meeting Minutes, the Staff Report associated with that meeting, and the follow-up letter to Mr. Esposito associated with that meeting, are all attached hereto as Exhibit A.

6. Mr. Esposito submitted a final plat, which appeared to contain corrections, which plat was on the agenda for the Commission's February 8, 2005 meeting, at which I was not present. However, my staff did review the final plat submitted, and I concur that Plat note 8 listed Block 4, Lot 10 (RV Parking and Storage) as a common area lot to be owned and maintained by the Homeowner's Association. The Commission voted to recommend to City

Council final plat approval for Greenbriar subject to certain conditions and based on the representations made in the proposed plat.

7. To the best of my knowledge, on each occasion that the preliminary plat and the final plat were presented, the lot designated for RV Parking and Storage Lot was intended to be owned and maintained by the homeowner's association for Greenbriar Estates Subdivision.

8. On February 23, 2005, I attended the Commission meeting during which Mr. Esposito was seeking annexation and zoning of a 1.7 acre portion to be used by Greenbriar Estates Subdivision for RV Parking. When the issue of maintenance of the RV Parking area was discussed, it was represented by Ms. Julianne Shaw, then Associate Planner for the City of Nampa, that it was considered to be part of the homeowner's association responsibilities, to which Mr. Esposito did not object or clarify. A true and correct copy of the Commission Meeting Minutes for February 23, 2005 is attached hereto as Exhibit B.

9. The final plat approved by both the Planning and Zoning Commission and City Council, and subsequently recorded by Mr. Esposito renumbered some of the Block and Lot numbers. Plat note 8 now listed the RV Parking and Storage lot as Block 1, Lot 39, but continued to represent that lot as one owned and maintained by the homeowner's association for Greenbriar Estates Subdivision.

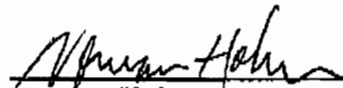
10. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the subject RV Parking and Storage Lot was going to be privately owned or that rents were going to be collected from homeowners for storage units that were to be built on that lot.

11. City Engineering and Planning Department staff would not have recommended the final Greenbriar plat for approval had they known there was going to be

operation of private storage units as a private business venture. In fact, once the Department learned that Mr. Esposito, through his entity Asbury Park, LLC, claimed that he privately owned the storage unit lot (and the units themselves) and was charging each homeowner rent for a unit, whether they chose to use the unit or not, I directed my staff to draft zoning provisions amending Ordinance No. 3805, and presented them to the Nampa City Council for approval. The amendment was adopted into law on August 18, 2008.

12. The amendment of the subject zoning provision was in direct reaction to the actions taken by Mr. Esposito and issues realized in the development of Greenbriar Estates, so that those issues would not similarly arise in any future subdivisions within the City of Nampa, and provide in relevant part that all residential subdivision common areas, inclusive of storage units, shall, unless otherwise specifically approved by the City of Nampa, be owned and maintained by a homeowner's association and shall not be retained in private ownership by the developer.

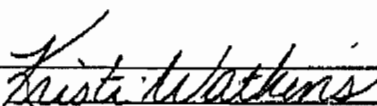
Further your affiant sayeth naught.


Norman Holm

STATE OF IDAHO)
) ss.
County of Canyon)

SUBSCRIBED AND SWORN before me this 30th day of September, 2009.



Name: 
Notary Public for Idaho
Residing at Caldwell, Idaho
My commission expires Sept 3, 2015

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF NORMAN HOLM by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290


Michelle R. Points

**NAMPA PLANNING & ZONING COMMISSION
MINUTES OF REGULAR MEETING HELD
TUESDAY, AUGUST 24, 2004, 6:30 P.M.**

Members:	Chris Veloz, Acting Chairman	Pam White
	Laura Alvarez-Schrag	Norm Holm, Director
	Rod Emery	Robert Hobbs, Assistant Director
	Sheila Keim	Julianne Shaw – Associate Planner
	Wes Miller	

Absent:	Wes Waggoner, Chairman	Aaron Randell
	Larry McMillin	Lynda Clark, City Council

Acting Chairman Veloz called the meeting to order at 6:50 P.M.

Approval of Minutes. Keim motioned and Miller seconded to approve the Minutes of the August 13, 2004 Planning and Zoning Commission. Motion carried.

Report on Council Actions. Councilor Clark being absent, Holm advised on City Council actions during the meeting of August 16, 2004: 1) Variance for substandard lot size at 233 High St – denied; 2) Rezone from RS to RD at 233 High St – approved; 3) Vacation of right-of-way of Charles St within Katharine Place Subdivision – approved; 4) Amendment of Chapters and/or Sections of Title 10 – Zoning Ordinance – approved; 5) Annexation and Zoning to RD for 4.10 acres at N Sugar St and E Powerline Rd – denied – consistent with the recommendation for denial by Planning and Zoning Commission.

Acting Chairman Veloz proceeded to the public hearing items on the agenda at 7:00 p.m.

Conditional Use Permit for an Electronic Message Center Sign for El Tenampa Restaurant at 248 Caldwell Blvd. (A portion of the NE ¼ Section 21 T3N R2W BM), for Ruben Pedraza.
Acting Chairman Veloz opened the meeting to public hearing.

Brian McClure of Andersen Signs, 415 E Belmont St, Caldwell spoke in favor of the conditional use permit application for an electronic message center sign at 248 Caldwell Blvd. Mr McClure advised the proposed sign would replace of an old manual letter sign. The proposed sign, continued Mr McClure, would be approximately 1 inch less in width and 2 inches less in height than the existing letter sign. According to Mr McClure the old cabinet had been taken down and the frame refabricated in order to slip the new message center inside the old cabinet. The new cabinet, continued Mr McClure was already in place, awaiting approval of the conditional use permit to allow placement of the electronic message center sign. According to Mr McClure, the wiring for the electronic sign had already been run up through the pole.

Shaw reviewed the staff report and gave the background of the electronic reader board sign regarding placement on the pole prior to application for a conditional use permit and discussed the requirements for a sign permit from the Building Department. No correspondence regarding the conditional use application, continued Shaw, had been received from surrounding property owners. Shaw noted the proposed electronic reader board was not in close proximity to any other electronic signs on Caldwell Blvd. Shaw reviewed the recommended conditions of approval.

Mickey Pence of 2416 College Ave, Caldwell, bookkeeper for the applicant, spoke in favor of the conditional use permit for an electronic reader board sign. Ms Pence stated that while applying for the conditional use permit she had been informed that a building permit was not required and the conditional use permit was all that was needed. Shaw noted the sign company usually acquired the sign permit through the Building Department.

**EXHIBIT
A**

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Mr McClure stated that, originally, the old reader board had been taken down, and at that time he had visited City Hall and had been advised by Zoning Enforcement and the Planning Department that a sign permit would not be required because refacing the original sign was the only work being done. Discussion followed on exactly what work had been done on the sign. According to Mr McClure, the frame had been placed back up on the pole and banners had been draped over the frame temporarily until the electronic reader board could be installed.

Emery motioned and Keim seconded to close public hearing. Motion carried.

Emery motioned and Keim seconded to approve the electronic reader board message sign for El Tenampa, subject to: 1) Compliance with all applicable requirements of agencies appropriately involved in the review of the request (e.g. Nampa Fire Department, Department of Health & Welfare, City Clerk, Nampa Building, Planning and Zoning and Engineering Divisions, etc; 2) Obtain all the proper permits for the overall sign; 3) Coordinate a meeting with the City of Nampa Planning and Building Departments, the applicant and the sign company to review all the signage for approval; 4) Coordinate with Idaho Power to meet their clearance and easement requirements; and, 3) Consent of the electronic sign is approved for 248 Caldwell Blvd for as long as it is used as a business – the permit is transferable. Motion carried.

Conditional Use Permit for Manufacturing, Wholesaling and Retailing of Tortillas in an IL Zoning District at 2603 Sundance Rd. (A portion of Lot 2, Sundance Commercial Park), for Manuel Ortiz, Jr.
The applicant was not present.

Holm reviewed the staff report and recommended conditions of approval. Holm advised the subject property was an existing building in the Sundance Commercial Park. The applicant was seeking approval of a conditional use permit to occupy a portion of the existing building to manufacture, wholesale and retail tortillas. Holm indicated the location of the Eddy's Bread store and noted the subject business would be at the back of the same building. According to Holm, the manufacturing of food products was allowed under the conditional use permit process in the IL zone. Holm noted the variety of uses within the Sundance Business Park and considered the proposed use would be compatible with the existing businesses. No correspondence, continued Holm, had been received from surrounding property owners or businesses regarding the requested conditional use permit.

Acting Chairman Veloz opened up the meeting to public hearing.

Julianne Shaw of 9950 Roan Meadows Dr, Boise, spoke in favor of the requested conditional use permit. Ms Shaw stated she had met with Mr Ortiz as a City staff member and noted the applicant had gone through a number of locations trying to find a suitable location for his food manufacturing, wholesale and retail business. Ms Shaw stated the applicant had a list of clients waiting for his product and noted Mr Ortiz had been very diligent in working with the City trying to find a suitable location. Possibly, continued Ms Shaw, the applicant was not present due to a language barrier as well as finding the public hearing process intimidating.

In response to a question from Acting Chairman Veloz, Holm noted the recommended condition of approval regarding the applicant meeting all State, Federal and City requirements for the subject business and property.

Keim motioned and White seconded to close public hearing. Keim considered the proposed business would fit nicely in to the subject business park. Keim noted major violations of conditional use permits in the past where C-U-P holders had completely ignored requirements for compliance. Keim suggested City services be terminated in those cases, and if the applicant brought the property into compliance then services would be restored.

Keim motioned and Emery seconded to approve the conditional use permit for the manufacturing, wholesaling and retailing of tortillas at 2603 Sundance Rd subject to: 1) Compliance with all applicable requirements of law administered by agencies appropriately involved in the review of the request (e.g. Nampa Fire Department, Nampa Building, Planning and Zoning and Engineering Divisions); and, 2) The conditional use permit shall be issued only for a facility for the manufacturing, wholesaling and retailing of tortillas. No other type of manufacturing use shall be allowed on the property; 3) The property shall continually be maintained in conformance with weed and nuisance ordinance provisions and Nampa City Code. 4) Failure to adhere to design and operating regulations of the IL zone/C-U-P conditions/Nampa City Code shall constitute grounds for consideration for revocation of the permit as well as termination of City utility services to the site. Motion carried.

Conditional Use Permit for a Trucking Yard or Terminal in an IP Zoning District on the west side of the 500 Block of N Kings Rd (Lots 2 and 3 of Schuler Subdivision – An approximate 2.64 acre portion of the NE ¼ of Section 23 T3N R2W BM), for Charles R Rowen.
Acting Chairman Veloz opened the meeting to public hearing.

Mike Millward of P O Box 2007, Homedale, representing the applicant, stated the applicant had 2 ½ acres on the west side of N Kings Rd. The applicant, continued Mr Millward proposed a truck storage yard for his 21 trucks and 50 trailers and construction of a shop, 1000 sq ft dispatch office, as well as a 6 ft high privacy fence around the perimeter of the property. There would be no hazardous material on site advised Mr Millward. Emery inquired how many trucks a day would be trying to access on to Garrity Blvd and noted that turning left or crossing Garrity would be very difficult given the amount of traffic.

Charles Rowen of 29500 Old Fort Boise Rd, Parma, the applicant, advised the trucks would probably egress via the Pacific Press route and hit Garrity Blvd at the new traffic light near the freeway. There would also be the option, continued Mr Rowen, of using Franklin Rd and Freeway Exit 36. According to Mr Rowen, he anticipated there would only be five or six trucks a day in and out of the subject property.

Hobbs reviewed the staff report and recommended conditions of approval. Hobbs noted the subject property was located in an industrial setting, buffered by commercial. Hobbs indicated the site plan and floor plan submitted by the applicant. Hobbs noted the site design would also be reviewed by the Planning, Building, Fire and Engineering staff at the time of building permit submission. Hobbs noted the screening, parking and landscaping requirements that would apply to the subject property and stated the applicant had already participated in a conceptual plan review.

Paul Schuler of 2904 Garrity Blvd, Nampa, stated he lived next door and questioned what would be done to control the run-off water from the subject property. With the change of use from trailer parking to a truck terminal with a shop and office building, continued Mr Schuler, there would have to be some way to control the run-off from the property.

Hobbs advised the Engineering Division, during building permit plan review, would check for site drainage, which by Code, had to be contained on site. Hobbs noted City Code currently required the business to be screened off from view from the public right of way but could be left in gravel where vehicles were parked and the trailers stored.

Mike Millward stated the applicant would comply with all the City of Nampa Codes and regulations that would pertain to the subject property and proposed building. Mr Millward noted the applicant had been in business for ten years and was looking for a location to allow for expansion of his business.

Keim motioned and Emery seconded to close public hearing. Motion carried.

Keim motioned and Alvarez-Schrag seconded to approve the conditional use permit for a trucking yard or terminal in an IP zone in the 500 Block of N Kings Rd subject to: 1)

Compliance with all applicable requirements of law administered by agencies appropriately involved in the review of the request (e.g. Nampa Fire Department, Nampa Building, Planning and Zoning and Engineering Divisions); 2) The property shall continually be maintained in conformance with Weed and Nuisance Ordinance provisions and Nampa City Code; and, 3) Failure to adhere to design and operating regulations of the IP Zone/C-U-P conditions/City Code shall constitute grounds for consideration for revocation of the permit as well as termination of City utility services to the site. Motion carried.

Annexation and Zoning to RP for 26.8 Acres, and Preliminary Plat Approval for Greenbriar Estates at the northwest corner of the intersection of 12th Avenue Rd and W Locust Ln (1 professional office lot, 78 single family detached lots, 12 single family attached lots, 1-100 unit assisted living lot, 1 RV parking lot, and 1 park lot on 26.8 acres. (A portion of the SE ¼ of Section 4 T2N R2W BM), for John A Esposito.

Acting Chairman Veloz opened the meeting to public hearing.

Sean Nickel of 52 N 2nd St, Eagle, representing the applicant, introduced Tony Jones to discuss the feasibility of the project.

Anthony Jones of D4K Consulting, 9884 E Highway 21, Boise, consultant economist representing the applicant, presented a feasibility study on the proposed project. Mr Jones reviewed the retirement community proposed for the south side of Nampa. According to Mr Jones, Mr Esposito was proposing home prices in the mid \$150,000 range. Mr Jones indicated the growth taking place in the Boise, Meridian, Nampa and Caldwell areas between 1970 and 2002 in both the total population and those 65+. Mr Jones also referred to the 55+ demographics for Canyon County. In summary, continued Mr Jones, all the retirement facilities in Nampa, except for one, were at 98 to 100 percent capacity with the result that retirement home services in the Nampa area were severely under supplied.

Sean Nickel reviewed the proposed preliminary plat and indicated the 70 single family residential lots, 8 common area lots, 1 RV storage parking lot, 1 lot for a future 120 unit assisted living facility, 12 townhouse lots and 1 medical professional lot for future medical offices. Mr Nickel noted the 1 acre landscaped park and the other landscaped common lots within the proposed development. The RV parking storage area for the residents, continued Mr Nickel, would be fenced. The assisted living facility and the medical professional lots, stated Mr Nickel, were planned for future design considerations. According to Mr Nickel, the proposed plan had been designed to meet all the minimum standards of the RP zone. Mr Nickel considered the proposed zoning and preliminary plat would be in compliance with the Nampa Comprehensive Plan and Low Density Residential and Neighborhood Center designations. The applicant, continued Mr Nickel, had instituted a neighborhood meeting and sent out approximately 75 letters to the surrounding neighbors, and 10 neighbors attended the meeting on August 16th. Mr Nickel stated the applicant was in agreement with the staff report. Emery inquired if the land would be leased or sold to the homeowner. Alvarez-Schrag noted Goldcrest Estates had not been included in the economic study presented by Mr Jones. In response to a question from Acting Chairman Veloz, Mr Nickel noted the proposed RP zoning would incorporate all the mixed uses in the Greenbriar Subdivision. Mr Nickel responded to a question from Alvarez-Schrag and advised the entire development would be geared to 55+ residents. Acting Chairman Veloz inquired why the subject location had been picked for the proposed 55+ subdivision and Mr Nickel stated the site was about 1 mile from shopping and about 1 ½ miles from the hospital. Emery inquired what phase of the development would go in first and Mr Nickel advised the two phases of single family homes would be commence first and the assisted living facility would be a phase on its own.

Hobbs indicated the advertisement regarding the annexation and proposed Greenbriar Estates informational meeting sent out by the developer's team to the neighbors, and the sign in sheet from that meeting on August 16, 2004. Hobbs reviewed the staff report and noted the property would be eligible for annexation being contiguous to the City on the east side of the property. The developer, continued Hobbs, had also supplied the legal description for the annexation of Locust Ln running east from Raintree Meadows to Hwy 45 in order to facilitate Nampa Police Department traffic and City vehicles over City roads to the subject

property. The requested RP zone, advised Hobbs, would facilitate a mixture of uses as shown in the proposed project. Hobbs referred to the Neighborhood Commercial Center as shown on the Comprehensive Plan land use map, which facilitated a variety of uses. The Neighborhood Commercial Center boundary is flexible, added Hobbs, and it had been determined the proposed project could be incorporated within the neighborhood commercial setting. The RP zone, added Hobbs, incorporated a 6,000 sq ft minimum lot size, which would be consistent with the proposed single-family lots. Hobbs recommended a development agreement be attached to the annexation if the Commission recommended approval. Hobbs reviewed the preliminary plat for Greenbriar Estates. The streets, continued Hobbs, were proposed as public streets with full curb, gutter and sidewalk improvements. There were two exceptions requested for the preliminary plat, noted Hobbs, one was the privacy fencing requested along the Kempthorn Lateral and a gated entrance for the north and south entrances to the development. Hobbs indicated Everdell Dr, shown on the north end of proposed Greenbriar Estates and noted the County subdivision to the north had dedicated right-of-way on the southern boundary line running westward. Hobbs discussed the options for the developer to either place a cul-de-sac at the existing Don St or looping a portion of Everdell Dr at the northeastern corner of the project. Hobbs reviewed the recommended conditions of approval, if approved by the Commission. Emery noted the northern ingress/egress point for the proposed subdivision would access the County subdivision to the north and questioned if the NPD and NFD would be able to go through the County subdivision to access Greenbriar Estates. Hobbs replied the NPD would have their main access along 12th Ave Rd/Hwy 45 (already annexed) and W Locust Ln (proposed for annexation with the Greenbriar Subdivision property) to the proposed subdivision as well as through the County subdivision to the north. Discussion followed on possibly enclaving properties to the north with the annexation of the subject property and W Locust Ln.

Acting Chairman Veloz noted the names of those on the sign up sheet indicating they were in favor of the proposed annexation and preliminary plat but did not wish to speak:

Wes Schober, 422 W Locust Ln, Nampa

Robb Schober, 532 W Locust Ln, Nampa

Jacqueline Schober, 532 W Locust Ln, Nampa

Sean Nickel referred to the Land Use section of the Comprehensive Plan regarding the intent of the Neighborhood Center area. Mr Nickel stated the developer was willing to enter into a development agreement for the subject property. According to Mr Nickel the revisions to the preliminary plat would be made and given to staff. Mr Nickel considered the access issue had been resolved with the NPD because the Locust Ln right-of-way would be annexed into the City the same time as the subject property. Mr Nickel considered an enclave had been created by annexing other developments in the vicinity and considered the subject development would help fill in the enclave and as development continued the enclaved areas would become smaller and smaller. White inquired about the projected time frame for development of the project and Mr Nickel replied the developer anticipated the subdivision would be completed within three years.

John Esposito of 354 N Cove Colony Way, Eagle, the developer, stated a doctor's office and dentist's office were projected for the medical office lots along W Locust Ln. Mr Esposito reiterated that the assisted living facility would be the third phase, with two single-family phases preceding. In response to a question from White, Mr Esposito advised all the homes would be single level, and the assisted living facility would be two levels and designed to look like the homes.

Hobbs reiterated the exceptions to the Subdivision Ordinance (entry gating and 6 ft vinyl fence along the lateral) would be reviewed by City Council as a business item. In response to a question from Veloz, Hobbs advised the Engineering Division had recommended to the developer that they find a way to encourage the property owners to the north of the subject project site to petition the Nampa Highway District to vacate a section of Everdell Dr right-of-way to the west to revert to the neighbor's ownership or control, and encourage the connection of Don St to the subject property and loop back to the north. Or, continued Hobbs, the Engineering Division would seek a right-of-way dedication from the developer of the subject property for sufficient room to put in a cul-de-sac in the vicinity of Don St.

White motioned and Alvarez-Schrag seconded to close public hearing. Motion carried. White considered the proposed over-55 subdivision was very much needed as the community continued to grow.

Emery motioned and Keim Seconded to recommend to City Council approval of the annexation and RP zoning for 26.8 acres and annexation of portions of W Locust Ln right-of-way subject to: 1) Compliance with all applicable requirements of those authorities/agencies appropriately involved in the review of the request (e.g. including but not limited to deeding and dedication of land to the City to facilitate right-of-way expansion of W Locust Ln where it abuts the property, as well as street naming, storm water and utility systems design, proper easement and pathway provision, Fire Department access, etc); and, 2) Enter into a Development Agreement with the City of Nampa to ensure continuation of proposed layout, lot sizes, etc, as shown on the proposed preliminary plat. Motion carried. ✓

Keim motioned Alvarez-Schrag seconded to approve the preliminary plat for Greenbriar Estates subject to: 1) Compliance with all applicable requirements of those authorities involved in the review of the request (e.g. Nampa Zoning, Engineering, Fire Divisions/Department, Southwest District Health, relevant irrigation district, etc); 2) Specifically, submit five 24" x 36" copies of a revised preliminary plat for review and approval prior to submitting for final plat and/or construction drawing approval(s) – The revised plat shall depict corrections in accordance with the following, a) Requirements listed in the August 13, 2004 memorandum from the Nampa Engineering Division, b) Requirement listed in the August 10, 2004 memorandum from Nampa Central Services Division regarding identification of the park lot, c) Requirements listed in the August 6, 2004 memorandum from the Nampa Engineering Division pertaining to street naming, d) Describe/depict what will constitute a secondary access road for the Fire Department during subdivision construction, and e) Any changes required or warranted based on conditions imposed by other agencies involved in the review of the request; 3) Enter into a Park Agreement with the City prior to recordation of the final plat; 4) A Homeowners' Association shall be formed to administer and care for (a) common area(s) within the residential portion of the subdivision –Some form of management organization shall be created to maintain the landscaping, paving and striping of the commercial area; 5) Any proposed subdivision fencing in the development along Locust Ln shall be placed at least 25' from the edge of the right-of-way (behind the landscape strip as relative to the road) – Any proposed subdivision fencing in the development along Everdell Dr shall be placed at least 15' from the edge of the right-of-way (behind the landscape strip as relative to the road) and shall not impair vision triangles – Any proposed developer emplaced, exterior subdivision fencing (except that required along the Kempthorn Lateral as noted hereafter) shall not be chain link— Individual lot owners may, however, certainly use such a type of fencing on their respective properties; 6) Correction of any spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes – Plat note number 6 has a spelling error that needs correcting – Plat note number 8 must be deleted – Plat note 14 requires separate Council action via business item review of the plat – Plat note number 15 needs to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to said lots; 7) Though not clearly evident from the preliminary plat, Lots 3-8, Block 4 are intended as zero-lot line townhouse lots – the revised preliminary plat will need to show a common property line cutting each of those lots in to two parts; 8) The landscape strip abutting Everdell Dr must be 15' wide and situated entirely on development property – The landscape strip adjacent locust Ln shall be 25' wide and also fully contained on the Greenbriar Estates site – Lot 12, Block 4 shall be paved unless screened from view by a 6' high closed vision fence; 9) The water system for the development shall be completely installed and able to deliver water prior to any Building Permits being issued within the development – The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or Uniform Fire Code requirements as applicable; and, 10) Emplace a 6' high chain link fence along the north/eastern side of the section of the Kempthorn Lateral where it abuts the

western/southwestern side of the subdivision – The fencing is required along the aforementioned lateral, along its entire length where any part of it will be left exposed or open – To provide for maintenance (e.g. weed control) of the area of land between the fencing and the waterway, it is suggested the developer follow one of the following methodologies, a) Provide for a gate for each lot having the 6' chain link fencing abutting their rear property line to access the land, or, b) Provide one or more gaps in the fencing to allow multiple people to access the area between the subdivision fence and the top of bank of the waterway(s) being screened, c) Designate the land between the subdivision fence and the top of bank of the waterway(s) being screened as a common lot (though it may contain an easement controlled by the irrigation district) and provide for its maintenance by the associated subdivision's homeowners' association, or, d) Obtain a license agreement from an appropriate Irrigation District in order to fence inside the water lateral's easement and consequently have all or a portion of the land included as part of the private building lots adjoining the waterway – If any land remains between the fence and the bank of the waterway, then it must be maintained as provided for in options (a) or (b) above, or, e) Cause any maintenance easement associated with the waterway to be vacated and the land once within the easement to be deeded to the adjoining property owner for their use and maintenance, f) Introduce one or more gaps in the fencing to facilitate individual property owners or homeowners' association representatives or hired contractors to access the easement area, or, g) Make the area into a railway that will be controlled and maintained by the affiliated homeowners' association via an easement or introduction of a new common lot or lots – or that will instead be deeded to the City for care, use and keeping. Motion carried, including the recommendation from White that City Council accept the suggestion of developing the subdivision as a gated community.

Acting Chairman Veloz proceeded to the business items on the agenda.

Final Plat Approval for Creekside Subdivision Phase 2 on the north side of W Lake Lowell Ave, adjacent and west of South Creek Subdivision (54 residential lots on 13.76 acres, 3.92 lots per acre) – A portion of the SE ¼ and a portion of the SW ¼ Section 29 T3N R2W BM), for Creekview Properties, LLC. Hobbs reviewed the staff report for the second phase of Creekside Subdivision, as well as the agency comments and recommended conditions of approval. According to Hobbs, the final plat for Phase 2 was in substantial conformance with the approved preliminary plat. Hobbs noted the plat also satisfied the Subdivision Ordinance and RS-6 zoning requirements.

Emery motioned and White seconded to recommend to City Council approval of the final plat of Creekside Subdivision No. 2 subject to: 1) Compliance with all other applicable requirements of all agencies appropriately involved in the review of the project (e.g. Nampa City Engineer, Nampa Fire Dept, Southwest District health, DEQ, pertinent irrigation district etc), including right-of-way dedication, etc, including conditions imposed at time of preliminary plat approval; 2) correction of any spelling, grammatical or punctuation errors evident on the plat or in it's notes; 3) The developer enter into a Park Development Agreement with the City of Nampa – Such an agreement must be executed prior to recording of the plat; and, 4) The water system for the development shall be completely installed and able to deliver water prior to any Building Permits being issued within the development – The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or Uniform Fire Code requirements as applicable. Motion carried.

Meeting adjourned at 8:30 P.M.

Norman L Holm, Planning Director _____

:sm

STAFF REPORT

Public Hearing Item No. 4

Meeting Date: August 24, 2004

To: Planning & Zoning Commission

Analyst: Robert Hobbs

Applicant(s)/Engineer(s):

John Esposito/Skinner Land Surveying

File(s): 07 & 13-04129

Requested Action Approval(s) and Location(s):

1. Annexation and zoning to RP (Residential Professional) for 26.8 acres, and;
2. Preliminary plat approval for **Greenbriar Estates Subdivision** (1 professional office lot, 78 single family detached lots, 12 single family attached lots, 1 100 unit assisted living lot, 1 RV parking lot, and 1 park lot on 26.8 acres);

All located at the intersection of 12th Avenue Road and W. Locust Lane in a portion of the SW ¼ of the SE ¼ of Section 04, T2N, R2W, Boise Meridian in Canyon County, Idaho hereinafter the "Property"

Correspondence:

Any correspondence from agencies or the citizenry is hereafter attached to this document for perusal. Agency comments are primarily geared towards recommending conditions for the project should it be approved.

ANNEXATION/ZONING CONCLUSIONS OF LAW

10-2-3 (C) Annexations and/or Rezones/Zoning assignments must be reasonably necessary, in the interest of the public, further promote the purposes of zoning, and be in agreement with the adopted Comprehensive Plan for the neighborhood. [Annexations must also connect the City with property being proposed for inclusion in the same per state code].

ANNEXATION/ZONING FINDINGS OF FACT

Contiguity:

Regarding connectivity to and alignment with properties/developments already in city limits, Staff finds:

1. That portions of the property's west side adjoins city limits where it abuts Raintree Village/Meadows Subdivision as depicted on the attached vicinity map, and;
2. That further connectivity is proposed to be established by annexation of Locust Lane from Raintree and the LDS church site west of the project on its southern end over to 12th Avenue Road to the east as depicted on the attached vicinity map. This resolves bulleted comment no. 2 of the memorandum provided by a representative of the police department, and;
3. That, given the afore-noted findings, the property is established as being contiguous to city limits, and;
4. That, therefore, such contiguity makes this project eligible for annexation/zoning consideration

Zoning:

Regarding proposed/desired zoning, Staff finds:

1. That RP zoning is not found overlaid on properties adjacent the proposed development, and;
2. That, notwithstanding, the adopted Comprehensive Plan designates the area adjacent this property as having a "Low Density Residential". According to the recently revised and adopted city comprehensive plan, Low Density Residential is typified as "Single family areas on traditional large to medium size lots. Represents 4.0 dwelling units per acre. This is the dominant land use in the City of Nampa. Typically, most desirable and affordable single family housing density. Likely to remain the most dominant housing unit in the foreseeable future." Such a setting has traditionally been held to support

application for RS Zone overlays but also fits a RP Zone, and;

3. The property is adjacent a "Neighborhood Center" overlay. The purpose of [neighborhood centers] is to create a centralized, identifiable, and service-oriented focal point for surrounding neighborhoods. The centers should be pedestrian-oriented, offering an internal circulation system that connects with adjacent neighborhoods or regional pathways. Medium to high density residential uses are an important element of the center. Higher concentrations of people will support the commercial uses and facilitate transit. A successful center will serve as public transit locations for future park and ride lots, bus stops, shuttle bus stops, or other alternative modes of transportation.

The plan map identifies land use areas within the neighborhood center designation. Developments within these centers, that comply with the neighborhood concept, will be considered regardless of the plan designation. Planning staff will work with potential applicants to facilitate appropriate neighborhood center development. Further comprehensive plan map amendment would not be required....

The ideal neighborhood center projects would include a small scale commercial component; street connectivity; office or public use; pathways; and residential density (not below eight dwelling units per acre). All centers are intended to provide a connection between existing public uses (schools, parks, etc.) and not be defined by the boundary streets. If successful, residents will access neighborhood commercial services without using arterial streets. However, the neighborhood centers should connect to and integrate with the larger street and pathway system."

4. That the Planning Director has permitted review of this request package in accordance with and under the

neighborhood center designation by stretching the same over to include the land involved in this proposal, and;

5. That amongst a multitude of zoning district types, RP zoning may certainly be requested to be established in a "Neighborhood Center" setting.
6. That the use types proposed by the developer, except for the assisted living center and office lot, are accommodated by the base RS zones that pertain to the "Low Density Residential" setting but are equally suitable to be developed in a RP Zone. That, therefore, the proposed request is not deemed to be spot zoning, and;
7. That the requested zoning and corresponding, expected "build out" density is supported by the Comprehensive Plan setting assigned to the area, and;
8. That uses on the ground or approved for development in the area are similar to what is being proposed by this development – single-family, detached residential housing to the west and north of the proposed development.
9. That the proposed plat features detached single family residence building lots with a build out density under the four units per acre Low Density recommendation of the Comp. Plan. However, the RP Zone allows 6,000 square foot building lots and has no minimum subdivision lot average or compatibility requirements.
10. That a feasibility study for the project has been completed of which a copy is hereafter attached. The summary of the study indicates a positive market for what is being proposed by the developer. Use of a development agreement will help ensure the city that the use and the project's layout, if approved, remain as presented. The commission may suggest such be drafted for this matter, the council may required it and the mayor sign it on behalf of the city.

SUBDIVISION INFORMATION/FINDINGS OF FACT

As presented to the planning commission:

Total Lot Count:	92(93)
Total Res. Bldg. Lot Count:	82-88
Total Common Lot Count:	9(10)
Total "Comm." Lot Count	2
Min. Allowed RP Lot Size:	6,000 sq. ft.
Min. Allowed Avg. Lot Size:	NA
Min. Proposed Bldg. Lot Size:	6,000 sq. ft.
(Max. Proposed Bldg. Lot Size:	130,764 sq. ft.
Min. Req. St. Frontage:	22 ft.-- per table
Zone's Min. Lot Widths:	50 ft. @ 20 ft.
Zone's Min. Lot Mean Depth	NA

Bulk Requirements:

Lot areas, frontages & lot widths are acceptable .

Proposed Plat Notes:

1. Water for domestic purposes shall be supplied by municipal facilities.
2. Sewage disposal will be by municipal facilities.
3. Post development storm water runoff shall be contained on site by means of barrow ditches and retention pond areas.
4. All street corners and cul-de-sac intersections shall have a 20 ft. radii.
5. Irrigation shall be supplied by pressure irrigation.
6. Current zone classification is agricultural in Canyon County. Requesting zone change to RP (Residential Professional District).
7. Utility and irrigation easement along the subdivision boundary are as noted. The street frontage of each lot shall have a 10 ft. wide general utility easement.
8. Should lot lines be adjusted the existing easement shall move with the adjusted lot line, provided that the utilities are not currently installed with the easements.
9. All utilities such as telephone and power lines shall be underground within the utility easement.
10. Contour interval is 2 ft.
11. Total number of residential lots is 84.
12. Total area of proposed subdivision is approximately 26.8 acres.
13. All common lots and landscape lots will be owned and maintained by a homeowners association.
14. Requesting a variance to install gates at each entrance and to install vinyl fence instead of 6 ft. chain link.

15. Lot 24, block 1, lot 18, block 2, lot 10, block 4 and lot 5, block 5 are storm water retention lots.

Transportation, Roadways, Traffic Shed & Trailways:

Regarding transportation, roadways & traffic shed Staff finds:

1. That the streets inside the proposed development are shown as public. Full ribbon curb, street, sidewalk and landscaping improvements as required by code are proposed, and;
2. That no cul-de-sacs are proposed, and;
3. That two accesses into/out of this subdivision are proposed by direct connection to Locust Lane and Everdell Drive). Standard city policy suggests that one ingress/egress be provided for every 100-150 lots in the development. Code prohibits dedication of half street sections save in very rare instances.
4. That according to Trip Generation, (a manual put out by the National Research Council and utilized as a common tool for determining traffic impacts on roads by engineers and planners nationally) expected average trip generation counts for the residential portion of the project should expectedly be about 1059.2 vehicle trips per weekday at full build out office lot aside. This includes buses, delivery and mail vehicles, work and emergency vehicles and so forth. Staff has no information available from Engineering that details the existing trip counts from other development in the area nor that gives ratings (A-F corresponding to delay times) to nearby intersections. This number is at best an estimate. Of key importance, if the developer maintains the project as an elderly project, it will quite expectedly generate less traffic than a standard single family residential development

with or without congregate housing (apartment buildings).

5. That engineering has provided comment regarding required right-of-way dedications as well as what to do with the section of Everdell Drive that extends past the subdivision's northern ingress/egress. Since Everdell will not connect with Raintree Subdivision, it is proposed that it be dead ended – see the engineering division's memorandum.

Regarding flood plain category, Staff finds:

1. That property is in a Zone C floodplain area (low risk – insurance not required). No available information establishes the area as being in a Nampa City Area of "Critical Concern". A copy of part of an environmental study for the project is hereafter attached.

Regarding trailways, fencing, landscaping & common lots, Staff finds:

1. That there is no trailway required to be emplaced in this project according to the relevant maps.
2. That fencing per city standards is required adjacent the north/east side of the project up against the Kempthorn Lateral easement that runs in sync with the west/southwest property line of the project.
3. The way the plat is drawn, no lot or block number is assigned to the remnant piece of ground that contains the Kempthorn's Lateral's easement on the project side of the waterway. A lot and block number will need to be assigned to that ground. The reason for the different quantity of lot numbers presented under the subdivision information table is because of this very minor problem.
4. Any developer proposed fencing along Locust Lane or Everdell Drive will have to be placed behind the

required landscape strips so as to not block the landscaping from view from the streets.

5. The required 25' wide landscape strip along Locust shown on the plat drawing has 5' of its expanse within the Locust right-of-way. This must be changed such that all of the 25' wide/deep strip is on the developer's land. The landscape strip along Everdell is depicted as 25' wide with 5' in that street's right-of-way. The planter strip at that location must also be solely contained in the development's confines but need only be 15' wide/deep per N.C.C. 10-27-6.D.
6. Plat note number 6 has a spelling error that needs correcting. Plat note number 8 must be deleted. Plat note 14 requires separate council action via business item review of the plat. Plat note number 15 needs to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to said lots.
7. Though not clearly evident from the preliminary plat, Lots 3-8, Block 4 are intended as zero-lot line townhouse lots. Any revised preliminary/final plat will need to show a common property line cutting each of those lots in to two parts.
8. Lot 12, Block 4 is intended to be established as a RV parking lot. No indication of whether the developer intends to pave or gravel the lot and/or have dump sites therein has been stated. No comments regarding fencing around the lot are provided either.
9. Any common lots intended to be provided as open space and counted towards providing the same (e.g., Lot 7, Block 3) will have to be landscaped. Prior to the punch list for the subdivision or its last phase being signed off, the landscaping and

related irrigation system will need to be in place.

**RECOMMENDED CONDITION(S) OF
APPROVAL**

The following draft Condition(s) of Approval is/are proposed for Commission consideration:

Annexation:

1. Generally, comply with all applicable requirements of those authorities/agencies appropriately involved in the review of this request (e.g., including but not limited to deeding and dedication of land to the city to facilitate right-of-way expansion of Amity Road where it abuts the property, as well as street naming, stormwater and utility systems design, proper easement and pathway provision, fire department access, etc.)

Potential Condition(s):

2. Enter into a Development Agreement with the City of Nampa to ensure continuation of proposed layout, lot sizes, etc. as shown on the proposed preliminary plat.

Plat:

1. Generally: Comply with all applicable requirements of those authorities involved in the review of this request (e.g., Nampa Zoning, Engineering, Fire Divisions/Department, Southwest District Health, relevant irrigation district, etc.).

Specifically: Submit five 24"x36" copies of a *revised* preliminary plat for review and approval prior to submitting for final plat and/or construction drawing approval(s). The revised plat shall depict corrections in accordance with the following:

- a. Requirements listed in the hereafter attached August 13, 2004 memorandum from the Nampa Engineering Division
- b. Requirement listed in the hereafter attached August 10, 2004 memorandum from Nampa Central Services Division

regarding identification of the park lot.

- c. Requirements listed in the hereafter attached August 06, 2004 memorandum from the Nampa Engineering Division pertaining to street naming

Also...

- d. Describe/depict what will constitute a secondary access road for the Fire Department during subdivision construction.
- e. Any changes required or warranted based on conditions imposed by other agencies involved in the review of this request.
2. Enter into a Park Agreement with the City prior to recordation of the final plat. Contact the Planning Director, Norm Holm for help regarding compliance with this condition.
3. A homeowners' association shall be formed to administer and care for (a) common area(s) within the residential portion of the subdivision. Some form of management organization shall be created to maintain the landscaping, paving and striping of the commercial area.
4. Any proposed subdivision fencing in this development along Locust Lane shall be placed at least 25' from the edge of the right-of-way (behind the landscape strip as relative to the road). Any proposed subdivision fencing in this development along Everdell Drive shall be placed at least 15' from the edge of the right-of-way (behind the landscape strip as relative to the road) and shall not impair vision triangles.

Any proposed, developer emplaced, exterior subdivision fencing (except that required along the Kempthorn Lateral as noted hereafter) shall not be chain link. Individual lot owners may, however, certainly use such a type of fencing on their respective properties.

5. Correction of any spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes. Plat note number 6 has a spelling error that needs correcting. Plat note number 8 must be deleted. Plat note 14 requires separate council action via business item review of the plat. Plat note number 15 needs to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to said lots.
6. Though not clearly evident from the preliminary plat, Lots 3-8, Block 4 are intended as zero-lot line townhouse lots. The revised preliminary plat will need to show a common property line cutting each of those lots in to two parts.
7. The landscape strip abutting Everdell Drive must be 15' wide and situated entirely on development property. The landscape strip adjacent Locust Lane shall be 25' wide and also fully contained on the Greenbriar Estates site.

Lot 12, Block 4 shall be paved unless screened from view by a 6' high closed vision fence.
8. The water system for the development shall be completely installed and able to deliver water prior to any Building Permits being issued within the development. The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or Uniform Fire Code requirements as applicable.
9. Emlace a 6' high chain link fence along the north/eastern side of the section of the Kempthorn Lateral where it abuts the western/southwestern side of the subdivision. The fencing is required along the afore-mentioned lateral, along its entire length where any part of it will be left exposed or open. To provide for maintenance (e.g., weed control) of the area of land between the fencing and the waterway, it is suggested that the

developer follow one of the following methodologies:

- a. Provide for a gate for each lot having the 6' chain link fencing abutting their rear property line to access the land, or;
- b. Provide one or more gaps in the fencing to allow multiple people to access the area between the subdivision fence and the top of bank of the waterway(s) being screened.
- c. Designate the land between the subdivision fence and the top of bank of the waterway(s) being screened as a common lot (though it may contain an easement controlled by the irrigation district) and provide for its maintenance by the associated subdivision's homeowners' association; or;
- d. Obtain a license agreement from an appropriate Irrigation District in order to fence inside the water lateral's easement and consequently have all or a portion of the land included as part of the private building lots adjoining the waterway. If any land remains between the fence and the bank of the waterway, then it must be maintained as provided for in options (a) or (b) above or;
- e. Cause any maintenance easement associated with the waterway to be vacated and the land once within the easement to be deeded to the adjoining property owner for their use and maintenance.

- f. Introduce one or more gaps in the fencing to facilitate individual property owners or homeowners' association representatives or hired contractors to access the easement area.
- g. Make the area into a trailway that will be controlled and maintained by the affiliated homeowners' association via an easement or introduction of a new common lot or lots -- or that will instead be deeded to the City for care, use and keeping.

ATTACHMENTS

- Vicinity Map (Exhibit/page "8")
- Copy of preliminary plat (Exhibit/page "9")
- Copies of any applicant/public/agency/legal correspondence/commission hearing minutes (Exhibits/pages "10+")

Planning & Zoning Division

Nampa, Idaho... Today's Vision is Tomorrow's Reality

August 25, 2004

Asbury Park, LLC
Attn.: Mr. John Esposito
2321 E. Faunhill Drive
Eagle, Idaho 83616

Re: Annexation and zoning to RP (Residential Professional) for 26.8 acres and preliminary plat approval for **Greenbriar Estates Subdivision** at the northwest corner of the intersection of 12th Avenue Road and West Locust Lane (1 professional office lot, 78 single family detached lots, 12 single family attached lots, 1 100 unit assisted living lot, 1 RV parking lot, and 1 approximately one acre park lot on 26.8 acres in a portion of the SW ¼ of the SE ¼ of Section 04, T2N, R2W, Boise Meridian) on the west side of Midland Blvd. north of W. Boone Ave. for John A. Esposito

Dear Mr. Esposito:

During their regularly scheduled public hearing of August 24, 2004, the Nampa City Planning and Zoning Commission voted to recommend approval of the above referenced annexation and zoning district assignment request to the city council. They subsequently voted to approve the above noted plan/plat approval request.

The commission issued their decisions contingent on compliance with certain conditions of approval as follows:

Regarding Annexation:

1. Generally, comply with all applicable requirements of those authorities/agencies appropriately involved in the review of this request (e.g., including but not limited to deeding and dedication of land to the city to facilitate right-of-way expansion of Amity Road where it abuts the property, as well as street naming, storm water and utility systems design, proper easement and pathway provision, fire department access, etc.)
2. Enter into a Development Agreement with the City of Nampa to ensure continuation of proposed layout, lot sizes, etc. as shown on the proposed preliminary plat.

Regarding the Plat:

1. Generally: Comply with all applicable requirements of those authorities involved in the review of this request (e.g., Nampa Zoning, Engineering, Fire Divisions/Department, Southwest District Health, relevant irrigation district, etc.).

000336

Specifically: Submit five 24"x36" copies of a *revised* preliminary plat for review and approval prior to submitting for final plat and/or construction drawing approval(s). The revised plat shall depict corrections in accordance with the following:

- a. Requirements listed in the hereafter attached August 13, 2004 memorandum from the Nampa Engineering Division
- b. Requirement listed in the hereafter attached August 10, 2004 memorandum from Nampa Central Services Division regarding identification of the park lot.
- c. Requirements listed in the hereafter attached August 06, 2004 memorandum from the Nampa Engineering Division pertaining to street naming

Also...

- d. Describe/depict what will constitute a secondary access road for the Fire Department during subdivision construction.
 - e. Any changes required or warranted based on conditions imposed by other agencies involved in the review of this request.
2. Enter into a Park Agreement with the City prior to recordation of the final plat. Contact the Planning Director, Norm Holm for help regarding compliance with this condition.
 3. A homeowners' association shall be formed to administer and care for (a) common area(s) within the residential portion of the subdivision. Some form of management organization shall be created to maintain the landscaping, paving and striping of the commercial area.
 4. Any proposed subdivision fencing in this development along Locust Lane shall be placed at least 25' from the edge of the right-of-way (behind the landscape strip as relative to the road). Any proposed subdivision fencing in this development along Everdell Drive shall be placed at least 15' from the edge of the right-of-way (behind the landscape strip as relative to the road) and shall not impair vision triangles.

Any proposed, developer emplaced, exterior subdivision fencing (except that required along the Kempthorn Lateral as noted hereafter) shall not be chain link. Individual lot owners may, however, certainly use such a type of fencing on their respective properties.

5. Correction of any spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes. Plat note number 6 has a spelling error that needs correcting. Plat note number 8 must be deleted. Plat note 14 requires separate council action via business item review of the plat. Plat note number 15 needs to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to said lots.
6. Though not clearly evident from the preliminary plat, Lots 3-8, Block 4 are intended as zero-lot line townhouse lots. The revised preliminary plat will need to show a common property line cutting each of those lots in to two parts.

7. The landscape strip abutting Everdell Drive must be 15' wide and situated entirely on development property. The landscape strip adjacent Locust Lane shall be 25' wide and also fully contained on the Greenbriar Estates site.

Lot 12, Block 4 shall be paved unless screened from view by a 6' high closed vision fence.

8. The water system for the development shall be completely installed and able to deliver water prior to any Building Permits being issued within the development. The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or Uniform Fire Code requirements as applicable.
9. Emplace a 6' high chain link fence along the north/eastern side of the section of the Kempthorn Lateral where it abuts the western/southwestern side of the subdivision. The fencing is required along the afore-mentioned lateral, along its entire length where any part of it will be left exposed or open. To provide for maintenance (e.g., weed control) of the area of land between the fencing and the waterway, it is suggested that the developer follow one of the following methodologies:
 - a. Provide for a gate for each lot having the 6' chain link fencing abutting their rear property line to access the land, or;
 - b. Provide one or more gaps in the fencing to allow multiple people to access the area between the subdivision fence and the top of bank of the waterway(s) being screened.
 - c. Designate the land between the subdivision fence and the top of bank of the waterway(s) being screened as a common lot (though it may contain an easement controlled by the irrigation district) and provide for its maintenance by the associated subdivision's homeowners' association; or;
 - d. Obtain a license agreement from an appropriate Irrigation District in order to fence inside the water lateral's easement and consequently have all or a portion of the land included as part of the private building lots adjoining the waterway. If any land remains between the fence and the bank of the waterway, then it must be maintained as provided for in options (a) or (b) above or;
 - e. Cause any maintenance easement associated with the waterway to be vacated and the land once within the easement to be deeded to the adjoining property owner for their use and maintenance.
 - f. Introduce one or more gaps in the fencing to facilitate individual property owners or homeowners' association representatives or hired contractors to access the easement area.
 - g. Make the area into a trailway that will be controlled and maintained by the affiliated homeowners' association via an easement or

introduction of a new common lot or lots -- or that will instead be deeded to the city for care, use and keeping.

The requested subdivision code exceptions (that of using a vinyl fence along Kempthorn Lateral in lieu of chain link and also having security gates across the subdivision's public right-of-way) will be addressed by the city council as a business item in a forthcoming meeting. It is expected that those two items will be heard on September 20, 2004.

If you should have any questions concerning this matter, please contact me during normal business hours Monday through Friday at 468-5457.

Sincerely,



Robert Hobbs
Assistant Director

GRH/rh

Cc: Skinner Land Survey Co.
2512 S. Georgia Ave.
Caldwell, Idaho 83605

Jim Brooks, Engineering Division

000339

Memorandum

To: Mayor and City council
Cc: Planning and Zoning
From: Jim Brooks
Date: August 13, 2004
Re: Greenbriar Estates- Preliminary Plat
Project: 07-04129PP

Review of the preliminary plat for Greenbriar Estates Subdivision:

1. It is assumed that this development will be provided with extensions of existing City services.
 - a. Sewer: The existing system flows to a temporary lift station in the Raintree development, which is intended to provide service for only the Raintree Subdivision. It is noted that the two churches recently constructed on Locust Lane contribute to this system, however their contribution to the downstream flows are minimal in nature, and occur at off-peak times thus having minimal impact. Therefore, prior to this project gaining approval, the ability of the City to provide sewer service to this development will need to be resolved to the satisfaction of the City Engineer.
 - i. Developer may be required to upgrade existing system at his cost, or through a "Local Improvement District" (LID). As has been discussed with the City's consulting engineer, this will require the construction of a trunkline from the existing system north of Greenhurst Road on Midland to the south, connecting to the existing system at the Trinity Hills Subdivision. At this juncture the developer has expressed willingness to be a participant in the process to accomplish this. As of this date the City is in the process of identifying the various properties that may be affected by, or can be served by construction of this line.
 - b. Water: Existing systems in the area are adequate to provide service for this development.
 - c. Pressure Irrigation: The developer has indicated that the parcel presently has an irrigation well on site that the developer has expressed an interest in turning over to the City. Details on the transfer will be required to be worked out between the developer and the City Engineer and the Water Superintendent. The developer

will also extend the existing systems to the project site to provide interconnectivity of the systems.

2. Streets are to be constructed to City of Nampa standards. Road cross sections and construction standards and requirements will be addressed with the submittal of engineered development plans. This will require that a formal Geo-Tech report be provided in order to verify the engineer's recommendations for storm drainage and street section designs.
 - a. Locust lane: 50' right-of-way dedication required. Construction to match existing.
 - b. Everdell Drive: 30' right-of-way dedication, or necessary to achieve a minimum 54' right-of-way. West end will require dedication to provide for a cul-de-sac as existing right-of-way dedication does not provide for a turn around.
 - c. Don Street: Required to match centerlines from Aurora Addition plat to Greenbriar plat at intersection of Everdell and Don.
 - d. Internal Streets: Right-of-way dedication needs to be a minimum of 54' for the following streets: Woodland, Brookwood, Thornwood, Edgeview, and Greenbriar with the following exception that Greenbriar and Don need to be widened to a minimum of 60' of right-of-way. All streets are to be constructed in accordance with current design standards in effect.
 - e. Gated Entrance: Note 14 indicated the developer desires to provide a gated entrance at both the north and south entrances to the project. It is Engineering's opinion that under the conditions stipulated in the City Code, this be allowed providing the streets remain private and conditions that address private streets are adhered to.
3. Easements are to be provided in accordance with current policy. Documents submitted do not depict any and therefore are required to be resubmitted with the appropriate notes.
 - a. The west boundary appears to be subject to an Idaho Power transmission line easement. Please identify and show including any "No Build" zones.
 - b. Kempthorne Lateral easement is required to be identified as to width and access requirements of the appropriate irrigation district.
4. Any irrigation laterals or users ditches running through the parcel that are to remain in use will need to be provided for as part of the engineered plan submittals. This may require additional easements and accesses. Improvements and or modifications to said facilities will be addressed with submittal of engineered development plans.
 - a. Fencing of all canals, laterals, and drain ditches will be required in accordance with current City of Nampa policy.
 - b. Verify width of irrigation access and maintenance easement. Irrigation district may require that the developer maintain an access road across parcels. City of Nampa will require that written verification be provided as to the irrigation districts wishes.
5. Street lighting, fire hydrant placement, and street signage will all be addressed with the submittal of engineered development plans.

12
August 13, 2004

6. The plat will be required to state who will own and maintain the common, landscape, and storm water retention lots with reference to the restrictive covenants as necessary. Provide appropriate notes on resubmittal.

Sylvia Mackrill

From: Deborah Spille
Sent: Tuesday, August 10, 2004 3:18 PM
To: Sylvia Mackrill
Subject: 07-04129 Greenbriar Estates Sub.

Sylvia,

We would like the one acre park to be specifically named by lot and block and to include a notation that it shall be owned and maintained by the HOA. Otherwise, we approve as is.

Deborah

000343

14

Memorandum

To: Rod Collins – Engineering Division

From: Sylvia Mackrill – Nampa Planning Department
City Hall, 411 Third Street S, Nampa, 83651
208-468-5484
Email: mackrill@ci.nampa.id.us

Date: August 6, 2004

Re: Greenbriar Estates Subdivision
Project No: 07-04129

Attached please find, for your review, the preliminary plat for Greenbriar Estates Subdivision, located on the north side of W Locust Ln, west of 12th Ave Rd and east of Raintree Meadows Subdivision. The applicants anticipate connection to City water, sewer and pressurized irrigation.

The subdivision preliminary plat is scheduled for review during the Planning and Zoning Commission meeting of August 24, 2004. Please return your comments to me by August 13th.

Thank you.

- Submit new street name for approval on woodland st, AND BROOKWOOD DR.
- ADD WEST TO EAST/WEST RUNNING STREETS
- ADD SOUTH TO NORTH/SOUTH RUNNING STREETS

**NAMPA PLANNING & ZONING COMMISSION
MINUTES OF REGULAR MEETING HELD
WEDNESDAY, FEBRUARY 23, 2005, 6:30 P.M.**

Members:	Wes Waggoner, Chairman	Aaron Randell
	Chris Veloz, Vice Chairman	Pam White
	Laura Alvarez-Schrag	Norm Holm, Director
	Rod Emery	Robert Hobbs, Assistant Director
	Larry McMillin	Julianne Shaw – Associate Planner
Absent:	Sheila Keim	Lynda Clark, City Council
	Wes Miller	

Chairman Waggoner called the meeting to order at 6:40 p m

Approval of Minutes. Randell motioned and McMillin seconded to approve the Minutes of the February 8, 2005 Planning and Zoning Commission meeting

Report on Council Actions. Councilor Clark being absent there was no report on City Council actions.

Chairman Waggoner proceeded to the business items on the agenda.

Hobbs introduced Michael Fuss, the recently appointed City Engineer for the City of Nampa.

Final Plat approval for Copper River Basin Subdivisions No. 1 and 2 at the southwest corner of the intersection of Middleton Rd and Roosevelt Ave. (131 single family residential lots on 32.77 acres – 4.0 dwellings per acre, being a portion of the SE ¼ of Section 30 T3N R2W BM), for Centennial Development, LLC. Hobbs indicated the memorandum from Jim Brooks of the Engineering Division, dated February 16, 2005 regarding Copper River Basin No 1 and dated February 18, 2005 regarding Copper River Basin No. 2. City Engineer Fuss noted the right-of-way dedication was actually shown greater than the required 40 ft on the plat for Roosevelt Ave, and, therefore, the proposed 45 ft would be adequate to cover the street section on Roosevelt Ave. Fuss referred to some minor utility issues that required amendment prior to review by City Council. Fuss stated the final plats were in substantial conformance with the approved preliminary plat.

Randell motioned and McMillin seconded to approve the final plats for Copper River Basin Subdivisions No. 1 and 2, subject to: 1) Compliance with all other applicable requirements of the City Engineer and all other appropriate agencies as pertaining to this development prior to recordation of the final plat or as otherwise may be appropriate in terms of timing; a) Memorandum from Jim Brooks of City of Nampa Engineering Division dated February 16, 2005; b) Memorandum from Jim Brooks of City of Nampa Engineering Division dated February 18, 2005; c) E-mail memorandum from James Bledsoe, PE, City of Nampa water model consultant; d) Memorandum from Rod Collins, City of Nampa Engineering Division dated January 25, 2005; e) E-mail memorandum from Deborah Spille, Nampa Parks Dept; f) Memorandum from Assistant Chief, Bill Angsbarger, Nampa Police Dept, dated February 2, 2005; g) E-mail memorandum from Earl Moran, Nampa City Forester, dated February 2, 2005; 2) There shall be no direct vehicular access permitted along Middleton Rd or Roosevelt Ave for any of the lots in the subdivision; 3) Enter into a Park Development Agreement with the City prior to recordation of the final plat; 4) A Homeowners' Association shall be formed to administer and care for (a) common area(s) within the subdivision such as common area; 5) Correction of spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes; and, 6)

**EXHIBIT
B**

000345

The water system for the development shall be completely installed and able to deliver water prior to any building permits being issued within the development - The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or International Fire Code requirements as applicable. Motion carried.

Irrigation Plan Approval for Wayne Russell Subdivision in the east Nampa Impact Area at the southwest corner of the intersection of E Powerline Rd and S Pit Ln (4 lots on 17.4 acres - .23 lots per acre - A portion of the NW ¼ of Section 30 T3N R1W BM), for James D Shervik
Hobbs noted Canyon County had requested review of the irrigation plans by the City for projects being developed in the impact area

White motioned and Alvarez-Schrag seconded to approve the irrigation plan for Wayne Russell Subdivision as a County subdivision, subject to there being no impact on the City of Nampa irrigation system; and the City retain the water rights should the subdivision be annexed into the City of Nampa irrigation system. Motion carried.

Irrigation Plan Approval for Remington Acres No. 2 Subdivision in the north Nampa Impact Area north of Cherry Lane at the end of Latigo Dr. (3 lots on 6.13 acres - .49 lots per acre - A portion of the SE ¼ of Section 2 T3N R2W BM), for Doug Strosnider

White motioned and Alvarez-Schrag seconded to approve the irrigation plan for Remington Acres No. 2 Subdivision as a County subdivision, subject to there being no impact on the City of Nampa irrigation system; and the City retain the water rights should the subdivision be annexed into the City of Nampa irrigation system. Motion carried.

Irrigation Plan Approval for Schwisow Pointe Subdivision in the east Nampa Impact Area on the south side of Airport Rd, east of N Robinson Rd (2 lots on 8.71 acres - .23 lots per acre - A portion of the SW ¼ Section 20 T3N R1W BM), for Tony and Kim Schwisow

White motioned and Alvarez-Schrag seconded to approve the irrigation plan for Schwisow Pointe Subdivision as a County subdivision, subject to there being no impact on the City of Nampa irrigation system; and the City retain the water rights should the subdivision be annexed into the City of Nampa irrigation system. Motion carried.

Holm advised the proposed Development Impact Fees and Capital Improvements Plan required a public hearing before the Nampa Planning and Zoning Commission. The consensus was to hold the public hearing at a special Planning and Zoning Commission meeting, at 7:00 p.m., Tuesday, March 29, 2005.

Chairman Waggoner left the meeting at 7:00 p.m. and Vice Chairman Veloz proceeded to the public hearing items on the agenda at 7:00 p.m.

Special Exception Permit for an Existing Retail Doll Shop in an RD Zoning District at 1011 W Willow Ave. (A portion of Lot 1, Block 2, OK Subdivision), for Bobbie Clark
Vice Chairman Veloz opened the meeting to public hearing

Bobbie Clark of 816 N Midland Blvd, No 38, Nampa, stated she had opened a small doll shop in October 17, 2003 at 1011 W Willow Ave. The operating hours, continued Ms Clark, were Friday 10:00 a.m. to 5:00 p.m. and Saturday 10:00 a.m. to 5:00 p.m. According to Ms Clark, her business involved selling new and used dolls, and sometimes repair and restore work. Ms Clark stated there were no hazardous materials involved in the business. There were no other employees involved in the business, added Ms Clark. Ms Clark stated there were seldom more than 6 people in the shop at one time. There were four

parking spaces in front of the property, continued Ms Clark, that did not interfere with the parking space for the surrounding home or apartments. Ms Clark stated the sign was located off the street and did not interfere with traffic. The landscaping, added Ms Clark, was low to the ground, and did not obscure visibility for vehicles. Prior to Bobbie's Babies occupying the building it was a pet grooming business. Ms Clark considered the doll shop did not affect the neighborhood in an unfavorable way. According to Ms Clark, the maintenance and improvements to the subject property had increased the value of the property. Traffic to the shop was minimal, added Ms Clark, and did not affect the flow of traffic on W Willow Ave. Ms Clark indicated a site plan of the property and floor plan of the business. Ms Clark stated she had obtained signatures from the neighbors in support of her business.

Shaw reviewed the staff report and noted the history of the Special Exception request. The garage of the existing dwelling, continued Shaw, had been turned into a dog grooming business some years ago. The doll shop business, continued Shaw, came to the attention of the City through a complaint to Code Enforcement. Shaw noted the new "Special Exception" section of the Code. Shaw reviewed the parking layout for the business and existing dwelling. In response to a question from Randell, Shaw noted the existing parking appeared to be sufficient. McMillin inquired if the owner of the business owned or lived in the dwelling. Shaw responded that if the applicant had also been the homeowner then the business could have been approved as a home occupation, but that was not the case. Holm noted the recommendation from Planning and Zoning would be referred to City Council for final decision on a "Special Exception" application. Shaw suggested reduction of the signage for the doll business to the 2 sq ft allowed under a Home Occupation.

McMillin motioned and White seconded to close public hearing. Motion carried.

McMillin motioned and Randell seconded to recommend City Council approval of the Special Exception Permit for the retail doll shop at 1011 W Willow Ave subject to: 1) Compliance with all applicable requirements of agencies appropriately involved in the review of the request (e.g. Nampa Fire Department, Department of Health and Welfare, City Clerk, Nampa Building, Planning and Zoning, and Engineering Divisions, etc) - All requirements of the adopted fire and building codes shall be satisfied in the use of the property; 2) Meet all building, fire and health requirements; 2) Limit signage to the guidelines of the home occupation regulations to preserve the nature of the residential area; and 3) Include in the special exception, approval of the non-compliance residential parking. Motion carried.

Annexation and Zoning to RP for a portion of 3323 S Stanford St. (A 1.7 acre portion of the SW ¼ of Section 4 T2N R2W BM), for Greenbriar Estates, LLC
Vice Chairman Veloz opened the meeting to public hearing.

John Esposito of 354 N Cove Colony Way, Eagle, the applicant, stated annexation and RP zoning had been requested for the subject parcel which would be utilized as RV parking for the recently approved Greenbriar Estates, adjacent and to the east of the subject parcel. Greenbriar Estates Subdivision, added Mr Esposito, had already been annexed into the City of Nampa. The proposed RV parking area, advised Mr Esposito, would be solely for the occupants of the Greenbriar Estates Subdivision, the same as the storage unit area within the subdivision. Mr Esposito advised he had been contacted by two concerned neighbors in Raintree Meadows, whose properties abutted the subject parcel. According to Mr Esposito, he had met with one of the property owners and assured him their concerns would be taken care of. The other adjacent property owner, added Mr Esposito, had called regarding a chain link fence between the properties. Mr Esposito stated he had declared to the adjacent Raintree property owner there would be a chain link fence with slats around the entire property, or a cedar dog-eared fence -- which the adjacent property owner preferred. The subject parcel, added Mr Esposito, would be a part of Greenbriar Subdivision. Veloz enquired if the RV parking area would be asphalt surfaced. Mr Esposito replied the parking area would be gravel, comprising between 25 to 50 RV parking spaces.

Shaw indicated the location of the subject property, east of Raintree Meadows, west of the recently approved Greenbriar Estates Subdivision, north of W Locust Ln and south of S Stanford St. Shaw noted the proposed amenities for the Greenbriar Estates Subdivision; medical office buildings fronting W Locust Ln, an assisted living facility, community park, community storage facility, and single family residential lots. The subdivision, added Shaw, was geared to the retirement population, and the proposed RV parking lot on the subject property, would be a part of the development. The RV parking area, added Shaw would only be for the use of the Greenbriar Estates residents, and would have limited access. Shaw reviewed the paved or gravel issue regarding the proposed RV parking area. City Code, continued Shaw, did allow a graveled lot, subject to site/sight obscuring landscaping or fencing. Shaw noted the developer could work out with the adjacent property owners the details of whether the fence would be cedar, vinyl or chain link. McMillin inquired about runoff from a compacted gravel surface and Shaw replied that all drainage was required to be kept on site. Alvarez-Schrag inquired about the requirements for maintenance of the graveled parking area to prevent deterioration. Shaw considered that would be a part of the Homeowners' Association responsibilities.

Emery motioned and Alvarez-Schrag seconded to close public hearing. Motion carried.

Emery motioned and McMillin seconded to recommend to City Council approval of the annexation and RP zoning for a 1.7 acre parcel (a portion of 3323 S Stanford St), subject to:

- 1) All driveways and parking areas shall have hard surfacing – Hard surfacing means non-gravel, paved with asphalt or concrete construction – Therefore hard surfaced driveways and parking areas will be required upon development;
- 2) Compliance with all applicable requirements of the City Engineer and all other appropriate agencies as pertaining to this development (e.g. street names [Fire Department], storm water area creation, design of utilities systems, street designs, etc);
- 3) Sanitary sewer service to the site will be through the expansion and upgrading of existing infrastructure that will be developed as per City of Nampa Engineering Division – Applicant will be responsible to construct the sewer mains to and through the development – Coordinate main sizing and routing with the Public Works Department requirements;
- 4) Domestic water and irrigation services to the site will be through the expansion and upgrading of existing infrastructure, the applicant will be responsible to construct the water and irrigation connections to and through the development and coordinate all requirements for the development with the Public Works Department requirements;
- 5) Any easements (i.e. Kempthorn Lateral, Idaho Power, etc) shall be respected and setbacks shall be met for the development; and
- 6) Compliance with all applicable requirements of the City and all other appropriate agencies as pertaining to the development.

Motion carried.

Annexation and Zoning to RS-7 and BC at the northwest corner of S Middleton Rd and W Roosevelt Ave. (A 40.02 acre portion of the NE ¼ of Section 30 T3N R2W BM), and Preliminary Plat Approval for Morningside Subdivision (121 single family residential lots and 1 commercial lot – 3.46 residential lots per acre), for Carolyn Tenn Enterprises, LLC
Vice Chairman Veloz opened the meeting to public hearing.

Kent Brown of Briggs Engineering, 1800 W Overland, Boise, representing the applicant, noted the request was for RS-7 zoning and BC zoning, similar to the Copper River Basin Subdivision to the south, at the southwest corner of S Middleton Rd and W Roosevelt Ave. Mr Brown noted the design for the traffic calming on the two longer streets had been amended and road "islands" were now proposed due to some subdivision streets of more than 500 ft of uninterrupted travel distance. According to Mr Brown, it had been found that in other developments the islands worked as a traffic-calming device. Mr Brown added that the small internal islands slowed the traffic down because visibility further down the street was reduced. According to Mr Brown, the LDS church owned the property at the southwest corner of the subject property and the Nampa School District owned the property to the northwest. A micro-path,

F I L E D
A.M. 6:10 P.M.

OCT 05 2009

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF SHEILA KEIM

SHEILA KEIM, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.
2. I have been a member of the Planning and Zoning Commission ("the Commission") for the City of Nampa since 2004. I was on the Commission during the time that

John Esposito and his entity Asbury Park, LLC was obtaining plat approval for the Greenbriar Estates Subdivision.

3. As part of the process of presenting a preliminary plat, the developer is requested to designate those areas in the plat that are going to be common areas and/or areas to be owned and maintained by the homeowner's association.

4. I first reviewed the preliminary plat for Greenbriar Estates Subdivision in July of 2004 and it was on the agenda at the Commission meeting held on August 24, 2004, at which I was present. I actually made the motion to approve the preliminary plat, subject to numerous conditions, including that Plat note number 15 needed to be revised to mention all of the common lots in the subdivision and must match the lot/block numbering assigned to those lots.

5. Mr. Esposito submitted another version of the preliminary plat, which appeared to contain corrections, which plat was on the agenda for the Commission's February 8, 2005 meeting, at which I was present. The plat submitted listed Block 4, Lot 1 (RV Parking and Storage) as a common area lot to be owned and maintained by the Homeowner's Association. It was voted to recommend to City Council final plat approval for Greenbriar subject to certain conditions. A true and correct copy of the Commission Meeting Minutes and Staff Report associated with that meeting are attached hereto as Exhibit A.

6. To the best of my recollection, on each occasion that the preliminary plat was presented, the lot designated for RV Parking and Storage Lot was intended to be owned by the homeowner's association for Greenbriar Estates Subdivision.

7. The Commission recommended the final plat for approval based on the representations that were made in the plat, through the approval process.

8. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the subject RV Parking and Storage Lot was going to be privately owned or that rents were going to be collected from homeowners for the storage units that were to be built on that lot.

9. I would not have voted to recommend the final Greenbriar plat for approval had I known that there was going to be the operation of private storage units as a private business venture.

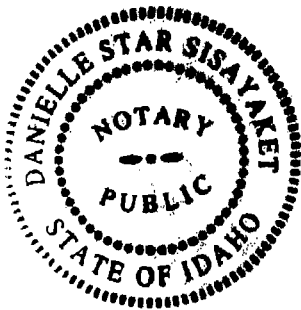
Further your affiant sayeth naught.

Sheila Keim
Sheila Keim

STATE OF IDAHO

County of Ada County *ss.*

SUBSCRIBED AND SWORN before me this 30th day of September, 2009.



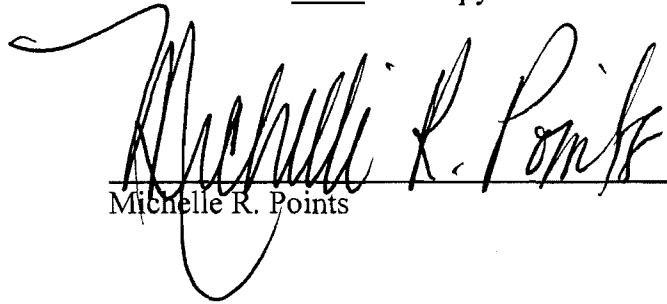
Danielle Star Sisayaket
Name: Danielle Star Sisayaket
Notary Public for Idaho
Residing at 10099 W. Gulick St Boise, ID 83709
My commission expires May 30, 2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF SHEILA KEIM by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290



Michelle R. Points

**NAMPA PLANNING & ZONING COMMISSION
MINUTES OF REGULAR MEETING HELD
TUESDAY, FEBRUARY 8, 2005, 6:30 P.M.**

Members:	Wes Waggoner, Chairman Chris Veloz, Vice Chairman Laura Alvarez-Schrag Sheila Keim Larry McMillin Wes Miller	Aaron Randell Pam White Robert Hobbs, Assistant Director Julianne Shaw – Associate Planner Stephen Kren – City Council
Absent:	Rod Emery Norm Holm, Director	Lynda Clark, City Council

Chairman Waggoner called the meeting to order at 6:37 p.m.

Approval of Minutes. McMillin motioned and White seconded to approve the Minutes of the Planning and Zoning Commission meeting of January 25, 2005. Motion carried.

Report on Council Actions. Councilor Stephen Kren advised the Planning Commission regarding the City Council meeting of February 7, 2005: 1) City Council reappointed Sheila Keim to the City of Nampa Planning Commission; 2) Rezone from RMH to BC for 421 11th Ave S – approved; 3) Annexation and RA zoning for approximately 321 acres between W Karcher Rd and W Orchard Ave on the west side and east side of N Midway Rd – postponed until City of Nampa representatives have a meeting with the Caldwell City Officials; 4) Annexation and Development Agreement Rezone to RMH on the north side of W Flamingo Ave, west of N Middleton Rd – postponed until developer submits a traffic impact study; 5) Public hearing regarding adopting Development Impact Fees and Capital Improvements Plan – postponed until after a public hearing before the Nampa Planning Commission.

Chairman Waggoner proceeded to the business items on the agenda.

Final Plat approval for Greenbriar Estates Subdivision at the northwest corner of 12th Avenue Rd and West Locust Ln (1 professional office lot, 78 single family detached lots, 12 single family attached lots, 1-100 unit assisted living lot, 1 RV parking lot, and 1 park lot on 26.8 acres (A portion of the SE ¼ of Section 4 T2N R2W BM), for John A Esposito.

Hobbs reviewed the staff report and recommended conditions of approval. Hobbs advised a revised plat had been submitted by the applicant 02/07/05. According to Hobbs, the final plat was in substantial conformance with the Subdivision Ordinance, the RP zoning standards and approved preliminary plat. Hobbs noted Lot 22, Block 2, would have common driveway access easement over Lot 21, Block 2. Hobbs indicated the location of the proposed assisted living center, the medical professional lot, and RV parking area. McMillin inquired about the size of the lots and Hobbs replied the lots would be 6,000 sq ft in size and up. Discussion followed regarding home construction occurring before the assisted living facility.

Veloz motioned and Randell seconded to recommend to City Council final plat approval for Greenbriar Estates Subdivision subject to: 1) Compliance with all other applicable requirements of the City Engineer and all other appropriate agencies as pertaining to the development prior to recordation of the final plat or as otherwise may be appropriate in terms of timing, a) Memorandum from Jim Brooks of the Engineering Division dated January 20, 2005, b) Memorandum from James Bledsoe of Keller Associates, Inc regarding City Water Model dated January 28, 2005, c) Fax from Jim Brooks of the Engineering Division dated November 22, 2004 regarding right-of-way and road sections, d) Letter from Brent Hoskins of the Nampa Fire Department dated January 24, 2005; 2) There shall be no

direct vehicular access permitted along Locust Ln for any of the lots in the subdivision; 3) Enter into a Park Development Agreement with the City prior to recordation of the final plat; 4) A Homeowners' Association shall be formed to administer and care for (a) common area(s) within the subdivision such as common area; 5) Correction of spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes; 6) The water system for the development shall be completely installed and able to deliver water prior to any building permits being issued within the development – The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with Fire Department policy or International Fire Code requirements as applicable; and, 7) Submit a revised final plat or mylar with corrections incorporated thereon to the City for Planning and Zoning Division approval before the final plat mylar can be recorded. Motion carried.

Chairman Waggoner proceeded to the public hearing items on the agenda at 7:00 p.m.

Annexation and Zoning to RS-7 at 3024 Sunnyridge Rd. (A 39.79 acre portion of the SE ¼ of Section 3 T2N R2W BM), and Preliminary Plat Approval for Lighthouse Subdivision on the east side of Sunnyridge Rd, north of Meadowbrook Ln (133 lots on 39.79 acres – 3.34 lots per acre), for Centennial Development, LLC.

Chairman Waggoner opened the meeting to public hearing.

Kevin Amar of 36 E Pine, Meridian, representing the applicants, indicated the location of the subject property, on the east side of Sunnyridge Rd. The annexation and preliminary plat request, continued Mr Amar, had been tabled during the January 25, 2005 Planning and Zoning Commission meeting because there were questions raised by both the Planning and Zoning Division and the Engineering Division. The applicants, advised Mr Amar, proposed installing a traffic calming device, and it had been determined it should be worked out between the Planning and Zoning Division and Engineering Division on whether traffic calming should be utilized. Mr Amar indicated the proposed pathway along the Wilson Drain. The proposed project, added Mr Amar, would be similar to the Coulter Bay Subdivision located at Franklin Rd and E Cherry Ln, a step up from the subdivisions surrounding the Lighthouse Subdivision. According to Mr Amar, the frontage along Sunnyridge Rd would be landscaped and incorporate a vinyl fence. Mr Amar noted a traffic study had been accomplished and there were no issues raised. Mr Amar noted some changes had been made to the plat to allow connectivity with Wilson Ponds, and provide open space more consistent with the setting. The average lot size, continued Mr Amar, exceeded the minimum RS-7 zone requirements. In response to a question from Veloz, Mr Amar advised the swale would handle the nuisance water. Randell inquired what the average size home would in the development. Amar replied it was anticipated Lighthouse Subdivision would be similar to Coulter Bay where the average home size was 1900 sq ft.

Hobbs reviewed the staff report and noted the subject parcel would be eligible for annexation into the City. The Comprehensive Plan Low Density Residential designation would support the proposed RS-7 zoning, with a density of less than 4 dwelling units per acre, advised Hobbs. Hobbs noted the proposed plat had been revised a few times. Hobbs stated the "traffic choker" was a Code requirement and would be a condition of approval. The lot average square footage, added Hobbs, met the required average of 7,500 sq ft. Hobbs reviewed the recommended conditions of approval.

David Bailey of Bailey Engineering, 1500 E Iron Eagle Dr, Eagle, representing the applicant, stated his company had prepared the preliminary plat. Veloz inquired about the percolation of the swales. Mr Bailey advised the design was such that nuisance water would be handled in an underground seepage bed and a large storm would be handled in the swale. The design, continued Mr Bailey, would be for 24 hour drainage of a "100 year storm".

Mike Gates of 880 Meadowbrook Ln, Nampa, stated he was not necessarily opposed, however, he did have questions regarding the proposed project. On the south side of the subject property, continued Mr Gates, was an irrigation ditch and all of the irrigation water run-off went into that ditch, which then drained back into Wilson Creek. Mr Gates questioned what the applicants planned to do with the irrigation ditch, and

STAFF REPORT

Business Item No. 1

Meeting Date: February 08, 2005

Analyst: Robert Hobbs

Applicant/Representative: John Esposito/Idaho Survey Group

File: 07-04129

Requested Action(s):

Receive final plat approval for

Greenbriar Estates Subdivision

(1 professional office lot, 78 detached single-family building lots, 12 attached single-family building lots, a 100 unit assisted living center lot, 1 RV parking lot and 1 park lot on 26.8 acres)

GENERAL FINDINGS

Location & Size of Property:

At the northwest corner of 12th Avenue Road and West Locust Lane in a portion of the SW ¼ of the SE ¼ of Section 04, T2N, R2W, Boise Meridian; Nampa, Canyon County, Idaho

STAFF FINDINGS

Project plat complies with relevant RS and subdivision standards and presents a design in compliance with the exceptions approved by council for internal roadway design and construction as well as right-of-way dedication along Locust.

RECOMMENDED CONDITION(S) OF APPROVAL

Should the Commission vote to recommend to the City Council that they approve the final plat, the following draft Condition(s) of Approval is/are proposed for consideration:

1. Comply with all other applicable requirements of the City Engineer and all other appropriate agencies as pertaining to this development prior to recordation of the final plat or as otherwise may be appropriate in terms of timing. See attached agency comments.
2. There shall be no direct vehicular access permitted along Locust Lane for any of the lots in the subdivision.
3. Enter into a Park Agreement with the city prior to recordation of the final plat. Contact the

Planning Director, Norm Holm, at (208) 468-5446 for help regarding compliance with this condition.

4. A homeowners' association shall be formed to administer and care for (a) common area(s) within the subdivision such as common area.
5. Correction of spelling, grammar and punctuation and numbering errors evident in the proposed plat development notes.
6. The water system for the development shall be completely installed and able to deliver water prior to any building permits being issued within the development. The water shall be sufficient in volume and pressure to provide sufficient adequate fire suppression for the development in accordance with fire department policy or International Fire Code requirements as applicable.
7. Submit a revised final plan or the mylar with corrections incorporated thereon to the city that must receive planning and zoning division approval before the final plat mylar can be recorded.

ATTACHMENTS

- Vicinity map
- Copy preliminary plat map
- Any agency/public correspondence

DEVELOPER:
JOHN ESPOSITO
EAGLE, IDAHO

PLAT SHOWING GREENBRIAR ESTATES SUBDIVISION

LOCATED IN A PORTION OF THE SW 1/4, OF THE SE 1/4, SECTION 4
T.2N., R.2W., B.M. CANYON COUNTY, IDAHO
2004

NOTES

1. ALL LOT LINES COMMON TO A PUBLIC RIGHT-OF-WAY LINE HAVE A 30' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EASEMENT EASEMENT UNLESS OTHERWISE SHOWN.
2. EACH SIDE OF INTERIOR LOT LINES HAVE A 5' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EASEMENT EASEMENT UNLESS OTHERWISE SHOWN.
3. EACH SIDE OF REAR LOT LINES HAVE AN 8' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EASEMENT EASEMENT UNLESS OTHERWISE SHOWN.
4. THE EXISTING SUBDIVISION BOUNDARY HAS A TWELVE (12) FOOT WIDE PUBLIC UTILITY, PROPERTY DRAINAGE, AND EASEMENT EASEMENT ON THE NORTH OF THE BOUNDARY UNLESS OTHERWISE SHOWN.
5. MAINTENANCE OF ANY IRRIGATION PIPE, DRAINAGE PIPE OR DITCH CROSSING A LOT IS THE RESPONSIBILITY OF THE LOT OWNER UNLESS SUCH RESPONSIBILITY IS ASSIGNED BY AN IRRIGATION OR DRAINAGE DISTRICT.
6. THIS SUBDIVISION IS SUBJECT TO COMPLIANCE WITH THE LAND CODE SECTION 31-3002 CONCERNING IRRIGATION WATER.
7. ANY REVISIONS OF THIS PLAT SHALL COMPLY WITH THE APPLICABLE IDAHO REGULATIONS IN EFFECT AT THE TIME OF REVISION.
8. LOTS 1 AND 10, BLOCK 1; LOT 7, BLOCK 3; LOTS 1, 2, 10 AND 11, BLOCK 4; LOT 4, BLOCK 6; LOT 1, BLOCK 7 ARE DESIGNATED AS COMMON AREA LOTS AND SHALL BE OWNED AND MAINTAINED BY THE HOMEOWNERS ASSOCIATION AS ESTABLISHED IN THE SUBDIVISION COVENANTS. SAID LOTS ARE SUBJECT TO PUBLIC UTILITY EASEMENTS.
9. ALL OF LOT 30, BLOCK 1, IS DESIGNATED AS A PUBLIC LOT AND SHALL HAVE A BLANKET STORM DRAIN AND DRAINAGE UTILITY EASEMENT.
10. LOT 2, BLOCK 4 IS DESIGNATED AS A MEDICAL-PROFESSIONAL LOT.
11. ALL LOTS IN THIS SUBDIVISION ARE DESIGNATED AS RESIDENTIAL LOTS UNLESS OTHERWISE NOTED.

LEGEND	
---	PROPERTY BOUNDARY LINE
---	LOT LINE
---	SECTION LINE
---	RIGHT-OF-WAY LINE
---	CENTERLINE
---	EASEMENT LINE
---	WATER LINE
○	LOT PIN
○	FOUND 5/8" IRON PIN
○	FOUND 3/4" IRON PIN
○	FOUND P.S. NAIL
○	CALCULATED POINT
○	SET 5/8" IRON PIN WITH CAP
○	SET 1/2" IRON PIN WITH CAP



CURVE DATA

Curve	Radius	Length	Chord	Chord Bg.	Date
1	100.00	100.00	100.00	100.00	10/10/04
2	100.00	100.00	100.00	100.00	10/10/04
3	100.00	100.00	100.00	100.00	10/10/04
4	100.00	100.00	100.00	100.00	10/10/04
5	100.00	100.00	100.00	100.00	10/10/04
6	100.00	100.00	100.00	100.00	10/10/04
7	100.00	100.00	100.00	100.00	10/10/04
8	100.00	100.00	100.00	100.00	10/10/04
9	100.00	100.00	100.00	100.00	10/10/04
10	100.00	100.00	100.00	100.00	10/10/04
11	100.00	100.00	100.00	100.00	10/10/04
12	100.00	100.00	100.00	100.00	10/10/04
13	100.00	100.00	100.00	100.00	10/10/04
14	100.00	100.00	100.00	100.00	10/10/04
15	100.00	100.00	100.00	100.00	10/10/04
16	100.00	100.00	100.00	100.00	10/10/04
17	100.00	100.00	100.00	100.00	10/10/04
18	100.00	100.00	100.00	100.00	10/10/04
19	100.00	100.00	100.00	100.00	10/10/04
20	100.00	100.00	100.00	100.00	10/10/04
21	100.00	100.00	100.00	100.00	10/10/04
22	100.00	100.00	100.00	100.00	10/10/04
23	100.00	100.00	100.00	100.00	10/10/04
24	100.00	100.00	100.00	100.00	10/10/04
25	100.00	100.00	100.00	100.00	10/10/04
26	100.00	100.00	100.00	100.00	10/10/04
27	100.00	100.00	100.00	100.00	10/10/04
28	100.00	100.00	100.00	100.00	10/10/04
29	100.00	100.00	100.00	100.00	10/10/04
30	100.00	100.00	100.00	100.00	10/10/04
31	100.00	100.00	100.00	100.00	10/10/04
32	100.00	100.00	100.00	100.00	10/10/04
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41	100.00	100.00	100.00	100.00	10/10/04
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44	100.00	100.00	100.00	100.00	10/10/04
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51	100.00	100.00	100.00	100.00	10/10/04
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66	100.00	100.00	100.00	100.00	10/10/04
67	100.00	100.00	100.00	100.00	10/10/04
68	100.00	100.00	100.00	100.00	10/10/04
69	100.00	100.00	100.00	100.00	10/10/04
70	100.00	100.00	100.00	100.00	10/10/04
71	100.00	100.00	100.00	100.00	10/10/04
72	100.00	100.00	100.00	100.00	10/10/04
73	100.00	100.00	100.00	100.00	10/10/04
74	100.00	100.00	100.00	100.00	10/10/04
75	100.00	100.00	100.00	100.00	10/10/04
76	100.00	100.00	100.00	100.00	10/10/04
77	100.00	100.00	100.00	100.00	10/10/04
78	100.00	100.00	100.00	100.00	10/10/04
79	100.00	100.00	100.00	100.00	10/10/04
80	100.00	100.00	100.00	100.00	10/10/04
81	100.00	100.00	100.00	100.00	10/10/04
82	100.00	100.00	100.00	100.00	10/10/04
83	100.00	100.00	100.00	100.00	10/10/04
84	100.00	100.00	100.00	100.00	10/10/04
85	100.00	100.00	100.00	100.00	10/10/04
86	100.00	100.00	100.00	100.00	10/10/04
87	100.00	100.00	100.00	100.00	10/10/04
88	100.00	100.00	100.00	100.00	10/10/04
89	100.00	100.00	100.00	100.00	10/10/04
90	100.00	100.00	100.00	100.00	10/10/04
91	100.00	100.00	100.00	100.00	10/10/04
92	100.00	100.00	100.00	100.00	10/10/04
93	100.00	100.00	100.00	100.00	10/10/04
94	100.00	100.00	100.00	100.00	10/10/04
95	100.00	100.00	100.00	100.00	10/10/04
96	100.00	100.00	100.00	100.00	10/10/04
97	100.00	100.00	100.00	100.00	10/10/04
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000356

AMATEUR MEASUREMENTS NO. 24 SUB
ADDITIONAL PLAT

received
11/10/05

PLAY SHOWING **GREENBRIAR ESTATES SUBDIVISION**

LOCATED IN A PORTION OF THE SW 1/4, OF THE SE 1/4, SECTION 4
 T.2N., R.2W., B.M. CANYON COUNTY, IDAHO
 2004



NOTES

- ALL LOT LINES CORRESPOND TO A PUBLIC RIGHT-OF-WAY LINE HAVE A 10' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY EASEMENT, AND EASEMENT EASEMENT EASEMENT EASEMENT.
- EACH SIDE OF SECTION LOT LINES HAVE A 10' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY EASEMENT, AND EASEMENT EASEMENT EASEMENT EASEMENT.
- EACH SIDE OF NEAR LOT LINES HAVE A 10' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY EASEMENT, AND EASEMENT EASEMENT EASEMENT EASEMENT.
- THE EXTENSION SUBDIVISION BOUNDARY HAS A 10' (10) FOOT WIDE PUBLIC UTILITY, PROPERTY EASEMENT, AND EASEMENT EASEMENT EASEMENT EASEMENT.
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CURVE DATA

Station	Angle	Length	Point	Point No.	Notes
1+00.00	90.00	100.00	1+100.00	1	START OF CURVE
1+100.00	90.00	100.00	1+200.00	2	END OF CURVE
1+200.00	90.00	100.00	1+300.00	3	START OF CURVE
1+300.00	90.00	100.00	1+400.00	4	END OF CURVE
1+400.00	90.00	100.00	1+500.00	5	START OF CURVE
1+500.00	90.00	100.00	1+600.00	6	END OF CURVE
1+600.00	90.00	100.00	1+700.00	7	START OF CURVE
1+700.00	90.00	100.00	1+800.00	8	END OF CURVE
1+800.00	90.00	100.00	1+900.00	9	START OF CURVE
1+900.00	90.00	100.00	2+000.00	10	END OF CURVE

JOB NO. 04-278
 SHEET 2 OF 3

received

DEVELOPER
 JOHN ESPINOZA
 EAGLE, IDAHO

ISG
 IDAHO
 SURVEY
 GROUP

RECEIVED
 11/10/05

000357

Locust Lane: I can support the dedication of a 40' half section for a future 80' dedication. This is based on the Raintree dedication of 40' as well as the LDS Church and what was asked of the developer of Constellation Creek on their preliminary plat.

This should allow for development of street sections that would be 33' back-to-back in the 50' right-of-ways; and 37' back-to-back in the 54'/56' areas. Locust Lane will need to match the existing section to the west. The Greenbriar/Locust Lane intersection will need to provide enough width, with marked lanes, for a left and right out.

Sincerely,

Jim Brooks

GREENBRIAR ESTATES SUBDIVISION



RESIDENTIAL LOTS

79 SINGLE FAMILY LOTS
12 TOWNHOUSE LOTS



ASSISTED LIVING FACILITY

128 BED FACILITY
CLOSE PROXIMITY TO COMMUNITY PARK



MEDICAL OFFICE BUILDINGS

TWO - 2400 SQUARE FOOT OFFICE UNITS
CONVENIENTLY LOCATED FOR LOCAL RESIDENTS



R.V. PARKING

SECURE FACILITY FOR COMMUNITY VEHICLES



COMMUNITY STORAGE FACILITY

SECURE FACILITY FOR COMMUNITY STORAGE



COMMUNITY PARK

OVER ONE ACRE OF PARK WITH AMENITIES SUCH AS: GAZEBO, (2) BOCCIE COURTS, HORSESHOE PITS, & 9-HOLE PUTTING GREEN



GATED ENTRIES

PROVIDE A SECURE COMMUNITY ATMOSPHERE
GATED ENTRIES AT BOTH LOCUST LANE AND EVERELL DRIVE

000359





City of Nampa

ENGINEERING DIVISION

CITY HALL 411 THIRD STREET SO. NAMPA, IDAHO 83651

OFFICE (208) 468-5444

FAX (208) 465-2261

Fax

To: Rich Tomlinson

From: Jim Brooks

Fax: 338-1777

Pages:

Phone: 871-0579

Date: November 22, 2004

Re: R.O.W. & Road Sections

CC:

☐ **Urgent** ☐ **For Review** ☐ **Please Comment** ☐ **Please Reply** ☐ **Please Recycle**

Rich,

Here are my notes from research on what we should be able to accept for right-of-ways and street sections in Greenbriar.

Raintree, the last phases, does have platted right-of-ways at 50'. These were for the non-continuous streets, or the loops, this is conditioned on less than 30 lots being served.

For Jon's project I can support the following streets to be platted at 50': So. Teakwood; So. Edgeview; W. Briar Hill, east of Don Street intersection; W. Thornwood. I base this on the assumption, once developed, half of the users will go north to Don and Greenbriar, and the others would go out the south end, thus meeting the intention of the 30 lot rule.

The following streets should be platted at 54' or 56', dependent on the street section chosen to allow for ample room to set the water and irrigation services and not conflict with the joint trench utilities: W. Briar Hill west of the intersection of Don Street; W. Greenwood, however, I would suggest that from the intersection of Greenbriar east to Teakwood, the street be widened because of the professional-medical use of the lots in this area of the sub. This is worth thinking about as this area will see more congestion and traffic that should be planned for.

Don Street: Plat at 56' to match existing Aurora plat.

So. Greenbriar: 54' or 56' except the section from Locust Lane to the Greenwood intersection which should be 60' as a minimum.

000360

FILED
A.M. 7:10 P.M.

OCT 05 2009

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF JOHN PRIESTER

JOHN PRIESTER, being first duly sworn upon oath, deposes and says:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action. I make this affidavit based on my personal knowledge.

2. I received my Professional Engineer License in 1976 and my Professional Engineer and Land Surveyor License in 1979. I worked in a private consulting practice for over

AFFIDAVIT OF JOHN PRIESTER - 1

44354.0001,1671893.1

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20 years, and in public work for over 18 years as the County Engineer and County Surveyor for Ada County.

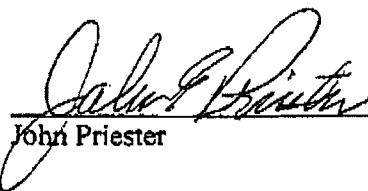
3. I am familiar with the issues in the above-captioned matter. I have reviewed the "Affidavit Authorizing Correction to Plat of Greenbriar Estates Subdivision" filed by Professional Land Surveyor Gregory G. Carter, recorded July 31, 2007.

4. I am familiar with documents referred to as "corrections" to recorded plats. I am aware of no statute, ordinance or other law that provides that ownership of property can be vested or divested through such a correction document.

5. Based on my knowledge, education and experience, corrections to the plat don't (or cannot) change anything substantively within the plat, but rather explain items in the plat so they are understandable to the public; corrections that make the plat make sense.

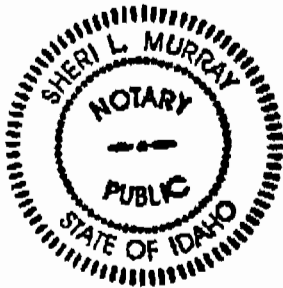
6. If a party wishes to substantively modify a plat, they must do so through the public plat approval process, as a substantive change to a plat cannot be made through a correction to the plat.

Further your affiant sayeth naught.


John Priester

STATE OF IDAHO)
) ss.
County of Canyon)

SUBSCRIBED AND SWORN before me this 29th day of September, 2009.



Sheri L. Murray
Notary Public for Idaho
Residing at Manapa, Idaho
My commission expires 12-14-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF JOHN PRIESTER by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290



Michelle R. Points

F I L E D
A.M. 4:40 P.M.
OCT 05 2009
CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF CHRIS VELOZ

CHRIS VELOZ, being first duly sworn upon oath, deposes and states as follows:

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

2. I have been a member of the Planning and Zoning Commission ("the Commission") for the City of Nampa for approximately 9 years. I was on the Commission

during the time that John Esposito and his entity Asbury Park, LLC was obtaining plat approval for the Greenbriar Estates Subdivision in the capacity of Vice-Chair and/or Acting Chair.

3. As part of the process of presenting a Preliminary Plat, the developer is requested to designate those areas in the plat that are going to be common areas and/or areas to be conveyed to and owned and maintained by the homeowner's association.

4. I first reviewed the Preliminary Plat for Greenbriar Estates Subdivision in July of 2004 and it was on the agenda at the Commission meeting held on August 24, 2004, at which I was present and Acting Chair. The Commission voted to approve the Preliminary Plat, subject to numerous conditions, including that Plat note number 15 needed to be revised to list all of the common lots in the subdivision and that the information listed in the Plat must match the lot/block numbering assigned to those lots.

5. Mr. Esposito later submitted another version of the Preliminary Plat or the first version of a Final Plat for the Commission's review, which appeared to contain numerous corrections.

6. This plat was on the agenda for the Commission's February 8, 2005 meeting, at which I was present. The plat submitted listed Block 4, Lot 1 (RV Parking and Storage) as a common area lot to be owned and maintained by the Homeowner's Association. During the February 8, 2005 meeting, it was voted to recommend to City Council Final Plat approval for Greenbriar subject to certain conditions.

7. On each occasion that the Plat for the subdivision was presented, the lot designated for RV Parking and Storage Lot it was represented that it was intended to be conveyed to and owned by the Homeowner's Association for Greenbriar Estates Subdivision.

8. On February 23, 2005, I attended the Commission meeting during which Mr. Esposito was seeking annexation and zoning of a 1.7 acre portion, located outside of the platted subdivision, to be used by Greenbriar Estates Subdivision for RV parking. When the issue of maintenance of the RV Parking area was discussed, it was represented by Ms. Julianne Shaw, then Associate Planner for the City of Nampa, that it was considered to be part of the homeowner's association responsibilities, to which Mr. Esposito did not object or clarify.

9. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the subject RV Parking and Storage Lot was going to be privately owned or that rents were going to be collected from homeowners for the storage units that were to be built on that lot. By designating that lot as one owned by the Homeowner's Association, Mr. Esposito represented to the Commission that he intended to convey that lot to the Homeowner's Association.

10. The Commission recommended the Greenbriar Final Plat for approval based on the representations that were made in the Plat that Mr. Esposito, would, among other things, make such a conveyance to the Homeowner's Association.

11. I would not have voted to recommend the Final Plat approval for Greenbriar Estates Subdivision had I known that there was going to be the operation of private storage units as a private business venture for use and ownership other than the Homeowner's Association for Greenbriar Estates.

Further your affiant sayeth naught.


Chris Veloz

STATE OF IDAHO

)

) ss.

County of Ada

)

SUBSCRIBED AND SWORN before me this 1 day of October, 2009.

CHAD J. REYNOLDS
NOTARY PUBLIC
STATE OF IDAHO

Name: Chad J Reynolds

Notary Public for Idaho

Residing at Lampa, Idaho

My commission expires 7/18/2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF CHRIS VELOZ by the method indicated below, and addressed to each of the following:

David M. Penny
COSH O HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290



Michelle R. Points

F I L E D
A.M. 4:10 P.M.

OCT 05 2009

CANYON COUNTY CLERK
C. DOCKINS, DEPUTY

Michelle R. Points, ISB No. 6224
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
 Boise, ID 83701-1617
 Telephone: 208.344.6000
 Facsimile: 208.954.5252
 Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
 liability company; and JOHN ESPOSITO, an
 individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
 ASSOCIATION, INC., an Idaho non-profit
 corporation; DEBRA HOBBS a/k/a DEBBIE
 HOBBS, an individual d/b/a ACTION
 ASSOCIATION MANAGEMENT
 COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AFFIDAVIT OF MARTIN THORNE

STATE OF IDAHO)
) ss.
 County of Canyon)

MARTIN THORNE, being first duly sworn upon oath, deposes and states as follows:

AFFIDAVIT OF MARTIN THORNE - 1

1. I have personal knowledge of the facts set forth herein and can testify as to the truth of the matters contained herein if called upon as a witness at the trial of this action.

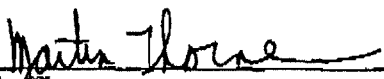
2. I was a member of the Nampa City Council ("the Council") for the City of Nampa from January 1997 through the present. I was on the Council during the time that John Esposito and his entity Asbury Park, LLC applied for approval of the Greenbriar Estates Subdivision.

3. The preliminary plat application came before the Council during meetings at which I was present. I cannot remember that the applicant's presentations included references to an RV storage area within the subdivision that would be an amenity for homeowners in the subdivision.

4. Neither Mr. Esposito nor any agent of Mr. Esposito ever represented that the RV storage was going to be privately owned or that rents were going to be collected from homeowners for storage units that were to be built on that lot.

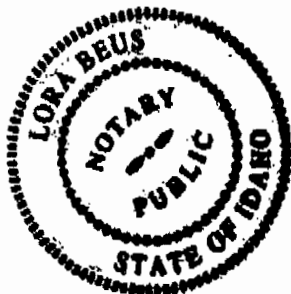
5. I would not have voted to recommend approval of the Greenbriar application had I known that there was going to be private storage units operated as a private business venture instead of a subdivision amenity.

Further, your affiant sayeth naught.



Martin Thorne

SUBSCRIBED AND SWORN before me this 5th day of October, 2009.



Lora Beus
Name: Lora Beus
Notary Public for Idaho
Residing at Nampa, Idaho
My commission expires 5-1-2012

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of October, 2009, I caused to be served a true copy of the foregoing AFFIDAVIT OF MARTIN THORNE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy


Michelle R. Points

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

FILED
 OCT 07 2009
 4:30 P.M.

CANYON COUNTY CLERK
 D. BUTLER, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
 THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
 liability company; and JOHN ESPOSITO,
 an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES
 HOMEOWNERS' ASSOCIATION, INC.,
 an Idaho non-profit corporation; DEBRA
 HOBBS a/k/a DEBBIE HOBBS, an
 individual d/b/a ACTION ASSOCIATION
 MANAGEMENT COMPANY.

Defendants.

Case No. CV 08-9740*C

**AFFIDAVIT OF DAVID M. PENNY IN
 SUPPORT OF ENTRY OF ORDER
 GRANTING PLAINTIFFS' MOTION
 FOR PARTIAL SUMMARY
 JUDGMENT**

STATE OF IDAHO)
)ss.
 County of Ada)

DAVID M. PENNY, being first duly sworn upon oath, deposes and says the following:

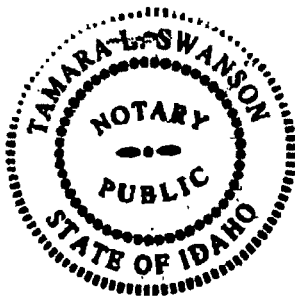
1. I am the attorney representing the Plaintiffs in the above-entitled matter, and I make this Affidavit of my own personal knowledge.

2. On September 21, 2009, the Court issued its Memorandum Decision granting Plaintiff's Motion for Partial Summary Judgment. Attached as Exhibit "A" is a ledger which correctly and accurately calculates the unpaid storage fees and prejudgment interest at the rate of 12% thereon.

FURTHER YOUR AFFIANT SAITH NAUGHT


DAVID M. PENNY

SUBSCRIBED AND SWORN to before me this 7 day of October, 2009.




NOTARY PUBLIC for Idaho

Residing at Idaho

Commission expires: 12-7-2013

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the ____ day of October, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: Facsimile (208) 954-5252



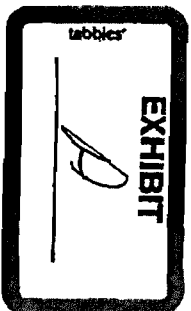
DAVID M. PENNY

ASBURY PARK V GREENBRIAR ESTATES

Storate Rental Fees

MONTH	OUTSTANDING RENT	PREJUDGMENT INTEREST	TOTAL DUE	12 % Interest - Per Diem Amt	Remarks
10/01/07	\$ 2,170.00	\$ 503.28	\$ 2,673.28	\$ 0.72	11/1/07 - 10/1/09: 699 days
11/01/07	\$ 2,170.00	\$ 481.68	\$ 2,651.68	\$ 0.72	12/1/07 - 10/1/09: 669 days
12/01/07	\$ 2,135.00	\$ 452.98	\$ 2,587.98	\$ 0.71	1/1/08 - 10/1/09: 638 days
01/01/08	\$ 2,135.00	\$ 730.97	\$ 2,865.97	\$ 0.71	2/1/08 - 10/1/09: 607 days
02/01/08	\$ 3,290.00	\$ 625.32	\$ 3,915.32	\$ 1.08	3/1/08 - 10/1/09: 579 days
03/01/08	\$ 3,290.00	\$ 591.84	\$ 3,881.84	\$ 1.08	4/1/08 - 10/1/09: 548 days
04/01/08	\$ 3,290.00	\$ 559.44	\$ 3,849.44	\$ 1.08	5/1/08 - 10/1/09: 518 days
05/01/08	\$ 3,290.00	\$ 525.96	\$ 3,815.96	\$ 1.08	6/1/08 - 10/1/09: 487 days
06/01/08	\$ 3,290.00	\$ 493.56	\$ 3,783.56	\$ 1.08	7/1/08 - 10/1/09: 457 days
07/01/08	\$ 3,290.00	\$ 460.08	\$ 3,750.08	\$ 1.08	8/1/08 - 10/1/09: 426 days
08/01/08	\$ 3,290.00	\$ 426.60	\$ 3,716.60	\$ 1.08	9/1/08 - 10/1/09: 395 days
09/01/08	\$ 3,290.00	\$ 394.20	\$ 3,684.20	\$ 1.08	10/1/08 - 10/1/09: 365 days
10/01/08	\$ 3,290.00	\$ 360.72	\$ 3,650.72	\$ 1.08	11/1/08 - 10/1/09: 334 days
11/01/08	\$ 3,290.00	\$ 328.32	\$ 3,618.32	\$ 1.08	12/1/08 - 10/1/09: 304 days
12/01/08	\$ 3,290.00	\$ 294.84	\$ 3,584.84	\$ 1.08	1/1/09 - 10/1/09: 273 days

000377



ASBURY PARK V GREENBRIAR ESTATES

Storate Rental Fees

01/01/09	\$ 3,290.00	\$ 261.36	\$ 3,551.36	\$ 1.08	2/1/09 - 10/1/09: 242 days
02/01/09	\$ 3,290.00	\$ 231.12	\$ 3,521.12	\$ 1.08	3/1/09 - 10/1/09: 214 days
03/01/09	\$ 3,290.00	\$ 197.64	\$ 3,487.64	\$ 1.08	4/1/09 - 10/1/09: 183 days
04/01/09	\$ 3,290.00	\$ 165.24	\$ 3,455.24	\$ 1.08	5/1/09 - 10/1/09: 153 days
05/01/09	\$ 3,290.00	\$ 131.76	\$ 3,421.76	\$ 1.08	6/1/09 - 10/1/09: 122 days
06/01/09	\$ 3,290.00	\$ 99.36	\$ 3,389.36	\$ 1.08	7/1/09 - 10/1/09: 92 days
07/01/09	\$ 3,290.00	\$ 65.88	\$ 3,355.88	\$ 1.08	8/1/09 - 10/1/09: 61 days
08/01/09	\$ 3,290.00	\$ 32.40	\$ 3,322.40	\$ 1.08	9/1/09 - 10/1/09: 30 days
09/01/09	\$ 3,290.00	\$ -	\$ 3,290.00		
	\$ 74,410.00	\$ 8,414.55	82824.55		

000378

11/9 R

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

F I L E D
A.M. *11/10* P.M.
NOV 10 2009 ✓

CANYON COUNTY CLERK
D. BUTLER, DEPUTY

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs,

v.

GREENBRIAR ESTATES
HOMEOWNERS' ASSOCIATION, INC.,
an Idaho non-profit corporation; DEBRA
HOBBS a/k/a DEBBIE HOBBS, an
individual d/b/a ACTION ASSOCIATION
MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION OF DEFENDANT'S
MOTION FOR RECONSIDERATION**

I. INTRODUCTION

The Motion for Reconsideration filed by the Greenbriar Estates Homeowners' Association, Inc. (hereinafter "Greenbriar HOA"), provides nothing new. No new arguments, no new law. While the Greenbriar HOA has submitted additional affidavits, the memorandum filed

by the Greenbriar HOA emphatically states that those affidavits are irrelevant because their claim is based upon “representations made in the CCR’s – not to the City of Nampa.”¹

The premise for the motion for reconsideration by the Greenbriar HOA appears to be that the Court did not understand their arguments and therefore pounding on the table while making the same arguments should be more convincing. The bottom line is that the Court got it right with the grant of partial summary judgment to the Plaintiffs. The theories advanced by the Greenbriar HOA show a fundamentally flawed application of the doctrine of common law dedication and a badly scrambled fraud theory that does not and cannot satisfy the elements of fraud.

II. ARGUMENT

A. **The Motion for Reconsideration is Entirely Dependent upon the Argument that the Greenbriar HOA Owned Lot 39, Block 1, However, No Law or Facts Support that Argument.**

The position taken by the Greenbriar HOA in support of the motion for reconsideration is emphatic and unequivocal. Their theory is stated throughout their memorandum.

It is the Greenbriar Homeowner’s position that Esposito fraudulently misrepresented in the CCR’s that he, *not* the Greenbriar Homeowners, was the owner of Lot 39, Block 1; and the Greenbriar Homeowners relied upon that misrepresentation until it later learned of the plat and Esposito’s actions before the City of Nampa.

Memorandum in Support of Motion for Reconsideration, P. 5.

¹ The title sentence of the first substantive section of the Memorandum in Support of Motion for Reconsideration states in full, “**The HOA’s fraudulent misrepresentation claim is based on the representations made in the CCR’s – Not to the City of Nampa.**” (Memorandum in Support of Motion for Reconsideration, P. 3).

That is exactly what the HOA did – they relied upon the misrepresentation in the CCR's that Esposito owned Lot 39 – when he didn't – because he had already dedicated Lot 39 when the HOA purchased their lots from builders.

Memorandum in Support of Motion for Reconsideration, P. 10.

Claiming to own Lot 39 and having facts and law to support that claim are two different things. The Court's grant of partial summary judgment was correct because the following legal and factual propositions are beyond dispute:

1. Asbury Park was in title and had deeded ownership of Lot 39, Block 1.
(See Affidavit of John Esposito, Para. 4.)
2. The recording of the final plat did not provide Greenbriar HOA with any rights to or in Lot 39. The recording of the final plat under Idaho law only conveys ownership of Public areas to the relevant municipalities. (See Idaho Code § 50-1312.)
3. Under Idaho law, "Common law dedication does not grant ownership of the parcel to another, but a limited right to use the land for a specific purpose. The law of dedication clearly states that dedication is not a transfer of title in the land, but the grant of an easement." *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 2009-ID-0122.184 (Id. S.Ct. January 1, 2009). (See Plaintiff's Memorandum in Support of Motion for Partial Summary Judgment, Page 5.)

Throughout the Memorandum submitted by the Greenbriar HOA, their only argument for ownership of Lot 39, Block 1 is the contention that the Court misapplied the doctrine of common law dedication. It is conclusively established by Idaho law that under the doctrine of common

law dedication, even if proven, there is not a change in ownership of the property. For this reason, Asbury Park was and is the owner of Lot 39, Block 1 and therefore the representation of that ownership in the CC&Rs was true. Since the Greenbriar HOA Motion for Reconsideration hinges entirely upon the proposition that ownership of Lot 39 was misrepresented in the CC&Rs, it is abundantly clear that the fraud theory must fail.

B. This Court Analyzed the Relevant Factual Record and Correctly Applied the Doctrine of Common Law Dedication.

The Greenbriar HOA has not changed its approach and argument from the initial briefing submitted in opposition to the Plaintiffs' Motion for Partial Summary Judgment. They completely ignore the fact that common law dedication does not change ownership and completely ignore the elements they would have to prove to establish common law dedication. Once again, they do not even cite the elements or address them in their briefing.

The Greenbriar HOA also does not want to accept the fact that common law dedication is the only way under Idaho law for them to claim any rights whatsoever arising from the error where Lot 39 was included in the list of lots under Note 8 to the plat.

As correctly stated by the Court, the determination of common law dedication is a question of law. The first element that the Greenbriar HOA would have to prove is "an offer by the owner clearly and unequivocally indicating an intent to dedicate the land...". (Memorandum Decision, Page 9, citing *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho at Page 7, 203 P.3d at 681-681 (2009).

C. **The Disconnect in the Argument Advanced by the Greenbriar HOA is the Legal Impact of the Recorded CC&Rs.**

It is undisputed that the CC&Rs contain Article IV, Section 4, which states, "The Community Storage Facility shall be privately owned and operated." The paragraph goes on to describe how rent shall be paid for the storage units. In return, the storage facility owner is responsible for the operation and maintenance expense of the facility.

Further, there is no dispute that the CC&Rs were recorded prior to the sale of lots by Asbury Park to the builders, Rocky Ridge and Prestige. The builders who purchased the lots from Asbury Park readily admit that they had actual and constructive knowledge that the storage facility would be owned and operated by Asbury Park. (See Affidavits of Jared Sherburne and Mike E. Pearson.)

The homeowners admit that they had actual knowledge of the content of the CC&Rs and under Idaho law, they had constructive knowledge of the CC&Rs recorded in the chain of title. While the warranty deeds from Asbury Park to the builders and from the builders to the homeowners identify their lot by reference to the Greenbriar plat, the deeds also expressly and unequivocally makes the conveyance subject to the restrictions in the CC&Rs.

The Court correctly analyzed these facts. In light of the recorded CC&Rs and the actual and constructive knowledge of both the builders and the homeowners, there is absolutely no way that the inclusion of Lot 39 in the list of lots in Note 8 to the plat can be a clear and unequivocal statement of intent by the Plaintiffs to dedicate Lot 39. In fact, the evidence is to the contrary and shows that at the time the lots were sold both to the builders and to the homeowners, the

Plaintiffs did not intend to dedicate the land. As recognized by the Court in its Decision, “The purpose of the doctrine of common law dedication is to protect the interests of purchasers who rely solely on the value of the public areas as reflected in the plat. *Saddlehorn Ranch Landowner’s Inc., v. Dyer*, 146 Idaho at Page 7, 203 P.3d at 682 (2009). (Memorandum Decision, Page 10.)

The homeowners’ whole argument is that they did not look at the plat until the Fall of 2007. Therefore, the homeowners could not have relied upon the content of the plat at the time they purchased their lots. They purchased knowing that the Plaintiffs claimed Lot 39 was privately owned and therefore purchased exactly what they knew they were acquiring.

D. The Additional Affidavits Add Nothing to the Case.

The Greenbriar HOA has attempted to supplement the record with affidavits from five (5) individuals who were either members of the Nampa Planning & Zoning Commission, Nampa City Council, or both. They have also submitted the Affidavit of John Priester who claims to be a professional engineer and land surveyor, and the Affidavit of Norman Holm who is the Director of the Nampa Planning & Zoning Department.

The fact that the affidavits of the Nampa Planning & Zoning members and Nampa City Council members are irrelevant is made clear by the Memorandum in Support of Motion for Reconsideration submitted by the Greenbriar HOA. In bold print at Page 3 of the Memorandum,

the Greenbriar HOA unequivocally states that its fraudulent misrepresentation claim “is based on the representations made in the CCR’s – not to the City of Nampa.”²

Given the fact that the Greenbriar HOA hinges its fraudulent misrepresentation claim entirely upon the CC&Rs, the affidavits submitted from the commissioners and council members are irrelevant.

The change in direction by the Greenbriar HOA is a tacit concession to the fact that this Court correctly analyzed their fraudulent misrepresentation against the elements for fraud established under Idaho law. (Memorandum Decision, Page 6.) Of course, the Greenbriar HOA did not exist at the time of the proceedings before the City of Nampa. The builders and the Greenbriar HOA members had not purchased any lots. Most important, the Greenbriar HOA members admit that they had actual and constructive knowledge of the content of the CC&Rs at the time that they purchased their lots and claimed that they did not know about the proceedings before the City of Nampa until the Fall of 2007. The affidavits submitted by the Greenbriar HOA tend to state that the Nampa Planning & Zoning and City Council was under the impression that Lot 39, Block 1 would be a common area based upon the note in the plat. This is of no significance because the Greenbriar HOA actually argues in its brief that the members were unaware of the proceedings before the City of Nampa and therefore misled by the CC&Rs where it stated that Asbury Park would be the private owner of the storage units.

The Greenbriar HOA has also submitted the Affidavit of John Priester who claims to have expertise with regard to surveying and recording plats, even though his opinion of the law

² A review of the Defendant’s Counterclaim shows that they did attempt to plead a cause of action for fraud based upon the proceedings before the City of Nampa.

is irrelevant. The correct answer is that his affidavit and the recording of a correction to the plat by Surveyor Gregory G. Carter is not determinative of the outcome of this case. It has nothing to do with the elements of common law dedication other than to show that once the Plaintiffs became aware of the error of listing Lot 39 in Note 8, immediate action was taken to correct it. The doctrine of common law dedication focuses upon the surrounding circumstances at the time that the lots were sold and whether there was a clear and unequivocal expression of intent to dedicate.

Finally, the Greenbriar HOA also submits the Affidavit of Norm Holm, which is again very similar to the affidavits of the commissioners and council members. As shown by the Affidavit of Norm Holm, the City of Nampa's response was to tighten up its ordinances regarding future subdivisions and subdivision amenities, which the City of Nampa was entitled to do. It has no bearing on the outcome of this case.

III. CONCLUSION.

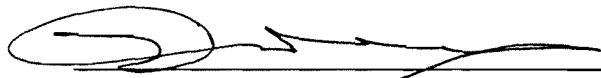
Idaho law is clear on the doctrine of common law dedication and the relevant factual record in support of the Court's prior decision remains unchanged. The Greenbriar HOA members were not misled by the plat, purchased their lots with actual and constructive knowledge of the terms of the CC&Rs, and were conveyed their lots subject to the recorded CC&Rs. They cannot now claim that their lots were offered to them on different terms or that fraud was committed. They purchased in Greenbriar Estates knowing that Asbury Park would privately own and operate the storage facilities, and they would be committed to pay rent on

those storage units. They are obligated to pay rent on the storage units as they agreed at the time of purchase.

For the foregoing reasons, the Motion for Reconsideration should be denied.

DATED this 9 day of ^{November}~~October~~, 2009.

COSHO HUMPHREY, LLP

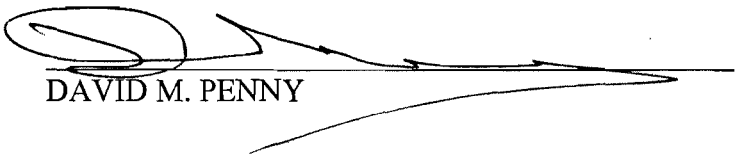


DAVID M. PENNY
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 9 day of ^{November}~~October~~, 2009, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: Facsimile (954-5252)


DAVID M. PENNY

11-19-Ryan
FILED
 A.M. 5:00 P.M.

NOV 17 2009

CANYON COUNTY CLERK
 J HEIDEMAN, DEPUTY

Michelle R. Points, ISB No. 6224
 HAWLEY TROXELL ENNIS & HAWLEY LLP
 877 Main Street, Suite 1000
 P.O. Box 1617
 Boise, ID 83701-1617
 Telephone: 208.344.6000
 Facsimile: 208.954.5252
 Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
 OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
 liability company; and JOHN ESPOSITO,
 an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
 ASSOCIATION, INC., an Idaho non-profit
 corporation; DEBRA HOBBS a/k/a DEBBIE
 HOBBS, an individual d/b/a ACTION
 ASSOCIATION MANAGEMENT
 COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

DEFENDANT/COUNTERCLAIMANT
 GREENBRIAR ESTATES
 HOMEOWNERS' ASSOCIATION,
 INC.'S MEMORANDUM IN REPLY
 TO PLAINTIFFS' OPPOSITION TO ITS
 MOTION FOR RECONSIDERATION

Defendant/Counterclaimant Greenbriar Homeowner's Association ("Greenbriar Homeowners"), by and through its counsel of record Hawley Troxell Ennis & Hawley, LLP, respectfully submits this Memorandum in Reply to Plaintiffs' Opposition to its Motion for Reconsideration.

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS'
 ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO
 ITS MOTION FOR RECONSIDERATION - 1

I.

INTRODUCTION

Plaintiffs Asbury Park, LLC and John Esposito (collectively "Esposito") in their Opposition, confuse the claims brought by Greenbriar, and avoid the crux of the Greenbriar Homeowners' claims entirely.

As the Court is aware, the Greenbriar Homeowners set forth in its Counterclaim, alternative bases for relief. Greenbriar Homeowners' quiet title claim is based on the allegation that Esposito misrepresented the ownership of Lot 39, Block 1 in the CCRs. Greenbriar Homeowners' claim of common law dedication is based on the plat, and representations made by Esposito, with regard to the plat. The Greenbriar Homeowners also assert that Esposito had a duty to convey Lot 39, Block 1 to the Greenbriar Homeowners upon turning the subdivision over. Contrary to Esposito's assertion, common law dedication is not the Greenbriar Homeowners' only argument for ownership or interest in Lot 39, Block 1.

A. There Is A Factual Basis For Greenbriar's Assertion That Esposito Misrepresented Ownership (or Nature of Ownership) Of Lot 39, Block 1 In The CCRs.

The Greenbriar Homeowners acknowledges that if the Court and/or a jury were to find that Esposito dedicated Lot 39, Block 1 under the theory of common law dedication, that the Greenbriar Homeowners would have an easement to use that lot for a specific purpose, and would not own Lot 39, Block 1 in fee simple.

Esposito appears to argue that if the Greenbriar Homeowners take the position in this litigation that they only have an easement right, and that if in fact Esposito maintained fee simple ownership of Lot 39, Block 1, that the Greenbriar Homeowners' "fraud theory must fail" – because Esposito is the owner – he did not misrepresent that fact. Plaintiffs' Memorandum in

Opposition of Defendant's Motion for Reconsideration ("Opposition Memo"), p. 4. Put another way, Esposito asserts that if Greenbriar only had an easement, it could not assert an argument of fraudulent misrepresentation and seek quiet title on that basis. Esposito is incorrect.

Certainly if a piece of property is dedicated to a homeowners' association for a specific purpose, members of that homeowners' association would not be forced to pay rent for use of the property, whether they utilized the lot or not, nor could the lot be privately "owned and operated" for a profit by a third party; a developer grantor of the easement could not own, operate for a specific purpose, a facility built on a piece of property that had been dedicated to a homeowners association for that same specific purpose. As such, because Lot 39, Block 1 was dedicated to the Greenbriar Homeowners for the specific purpose of a storage facility, it cannot be owned and operated by a private entity as represented in the CC&Rs.

Plaintiffs recognize case law that stands for the proposition that common law dedication is a grant of a "limited right to use land for a specific purpose." Opposition Memo, p. 3, citing *Saddlehorn Ranch Landowner's, Inc. v. Dyer*, 146 Idaho 747, 203 P.3d 677 (2009). In this case, based on the plat, Lot 39, Block 1 was to be conveyed to the Greenbriar Homeowners, so those homeowners could use the storage facility for a specific purpose. The CC&Rs represent a quite contrary scenario. The CC&Rs do not speak to mere fee ownership of Lot 39, Block 1 as inferred by Esposito in Plaintiffs' Oppositions, and certainly do not contemplate an easement by the Greenbriar Homeowners; they speak to the ownership and operation of a storage facility, which if that lot had been dedicated, would not be owned and operated privately at a steep and arbitrary cost to the Greenbriar Homeowners.

Moreover, the Greenbriar Homeowners also assert in the Counterclaim that Esposito had a duty to turn over Lot 39, Block 1 to the Greenbriar Homeowners (consistent with Esposito's

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO
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representations to the City of Nampa), which would render Esposito's representation of continued private ownership of the storage unit facility in the CC&Rs, a misrepresentation.

There is certainly a question of material fact as to whether the representation of Lot 39, Block 1 in the CC&Rs was a misrepresentation, based on the alternative scenarios where Lot 39, Block 1 was dedicated to the Greenbriar Homeowners and/or whether Esposito had a duty to turn Lot 39, Block 1 over to the Greenbriar Homeowners, and/or whether the CC&Rs misrepresent the storage area facility based on those scenarios, as it could not be "owned and operated" by some unidentified entity under those as contemplated in the CC&Rs, and certainly not at a cost to the homeowners over which they have no control.

Simply because Esposito self-servingly claims now that the CC&Rs do not contain a misrepresentation, does not make it so, and his actions taken to the contrary certainly create an issue of material fact as to prevent an entry of summary judgment.

B. Esposito Dedicated Lot 39, Block 1 to Greenbriar, Or There Exists An Issue Of Material Fact As To Whether Such Dedication Took Place, And Esposito's Motion For Summary Judgment Should Not Be Granted.

Esposito asserts that Greenbriar Homeowners did not address the elements of common law dedication in its briefing, but fails to discuss the facts Greenbriar Homeowners sets forth in support of its claim.

As set forth in Greenbriar Homeowners' opening memorandum on this motion, the Greenbriar Homeowners assert, as an affirmative theory of relief, that Esposito dedicated Lot 39, Block 1 to the individual lot owners as common area under the doctrine of common law dedication.

Although Esposito was the owner of Lot 39, Block 1, during the development of the Subdivision, and states that he intended to remain the owner of that lot, that does not negate the

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO
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fact that Esposito, through his actions, effectively dedicated Lot 39, Block 1 to the Greenbriar Homeowners.

As set forth in the affidavits previously filed in support of this motion, Esposito on at least three occasions in his submissions to the City of Nampa in writing stated that the storage unit lot would be conveyed to, owned, and maintained by the Greenbriar Homeowners.

Esposito drafted the plat, applied for the plat to be approved, recorded the plat and conveyed property to the builders who bought up all the residential lots in the subdivision, with reference to the plat. “[W]hen an owner of land plats the land, files the plat for record, and sells the lot by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished.” *Saddlehorn Ranch Landowners, Inc., v. Dyer*, 146 Idaho 747, 752, 203 P.3d 677, 682 (2009), quoting *Monaco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978) (other citations omitted).

Esposito’s intention to dedicate the subject lot can be found in the very plats submitted to the City of Nampa. In Plaintiffs’ Opposition, Esposito asserts that Greenbriar has not spoken to the first element of proof in asserting its claim of common law dedication, but in fact it has.

Esposito clearly and unequivocally manifested, in his representation of the plat to the Planning and Zoning Commission and to the City Council that he intended Lot 39, Block 1 to be owned by the Greenbriar Homeowners. *See Saddlehorn, supra*, p. 7, 203 P.3d at 681. That offer was accepted by the Planning and Zoning Commission and City Council, as evidenced by their respective approval of the plat, and Esposito conveyed the lots in the subdivision to buyers with reference to the plat. Under *Saddlehorn*, Esposito affectively dedicated Lot 39, Block 1 to the Greenbriar Homeowners. Under this alternative claim for relief (common law dedication), the

Greenbriar Homeowners "own" a limited right to use the storage units located on Lot 39, Block 1, even if they do not own that lot in fee.

Of course Esposito claims now that he didn't mean to dedicate the lot, and that it was a "mistake" that the lot was listed in Note 8. That is the very essence of the Idaho Supreme Court cases on the issue of dedication. That is, developers coming forward after the dedication occurs, claiming they didn't "mean to" or "intend to" make the dedication. Esposito's explanation regarding this mistake is simply not believable and cannot somehow "undo" his dedication.

Designating Lot 39, Block 1 as a common area lot was not an error by Esposito; he intended City officials to rely upon the plat, and approve the plat, with the hope that the inclusion of the "private ownership" of the storage units contained in the CC&Rs and his collection of obligatory rents would go unchallenged.

Again, and like the developer in *Saddlebrook, supra*, Esposito recorded the plat, which plat was accepted and approved by the City of Nampa. Esposito then sold lots in the Greenbriar Subdivision with reference to the plat, knowing that potential owners could and would rely upon the positive assertions in the recorded plat including that the storage areas would be owned and maintained by the Homeowners' Association. *See e.g. Saddlebrook*, at 752, 203 P.3d at 682.

C. Esposito's Interpretation Of The "Impact" Of The CCRs Is Not Supported By The Law.

Esposito continues to insist that the CC&Rs trump all other documents in this case, whether approved through a public procedure through a public body or otherwise. Esposito argues that there "is absolutely no way that the inclusion of Lot 39 in the list of lots in Note 8 can be a clear and unequivocal statement of the intent by Plaintiffs to dedicate Lot 39" because the

builders and homeowners knew that Esposito knew of the contents of the CC&Rs, specifically that Lot 39, Block 1 was privately owned.

Contrary to Esposito's inference, the inquiry on a claim of common law dedication is not what the potential purchaser did or did not know or rely upon, but what was offered (via the plat), accepted, and thereafter referenced in a conveyance. Esposito's actions confirm a common law dedication.

Esposito further asserts that because the homeowners did not rely on the content of the plat, but rather relied upon the CC&Rs, they can make no claim against Esposito. Esposito's argument is nonsensical. There is no legal authority that supports the proposition that if a homeowner later learns that a developer dedicated a lot, and the developer later claims they did not, that the homeowner is somehow barred from bringing a claim for common law dedication against that developer. Moreover, that homeowners signed the CC&Rs has no relevance to the inquiry of whether Esposito effectively dedicated the lot to the Greenbriar Homeowners, as the CC&Rs cannot modify the information contained on the plat or otherwise limit the legal significance of its contents. One has nothing to do with the other.

As set forth in Greenbriar's opening memorandum on this motion, the final plat was recorded before the CC&Rs. The Articles of Incorporation were filed one day after the CC&Rs, and contradict the CC&Rs with regard to the designation of common areas and payment of Greenbriar Homeowners' monies, which per its own language, cannot benefit a private person or member of the HOA.

The CC&Rs are not a document of conveyance or instrument validating ownership. In any event, the Greenbriar Homeowners maintain that the CC&Rs contain a mistake and/or

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO
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fraudulent misrepresentation that Esposito privately owns Lot 39, Block 1 and are invalid in that regard.

Esposito cannot be heard to argue that he had no obligation to convey ownership of Lot 39, Block 1 when he turned the Subdivision over to the HOA, or that he made no dedication of that lot, because he drafted the CC&Rs in such a way that he did not have to.

Again, Esposito's drafting the CCR's to pad his own pocketbook does not and cannot affect his dedication of the subject lot. A self-serving contract cannot contradict or circumvent a publicly approved, recorded document and there is not legal authority to support a holding otherwise.

That the CC&Rs were recorded before the conveyance of any lot does not effectuate or constitute a valid conveyance or transfer of ownership rights in real property. A developer cannot, as a matter of law, utilize CC&Rs to contradict the conditions imposed by the governing body as a requirement to approving the final plat and authorizing its recording. Idaho law makes no allowance for CC&Rs to contradict or modify a recorded plat.

D. The Affidavit Submitted With The Motion For Reconsideration Are Relevant To Greenbriar's Claim Under Fraudulent Misrepresentation And Common Law Dedication.

Esposito claims that the affidavits of several members of the Nampa Planning and Zoning Department and the Nampa City Council are irrelevant to the Greenbriar Homeowners' claim because the Greenbriar Homeowners state that the claim of fraudulent misrepresentation is based on the representations in the CC&Rs and not to the City of Nampa. Esposito again confuses Greenbriar's argument.

Representations Esposito made to the City of Nampa are relevant to the Greenbriar Homeowners' claim of common law dedication. Based on the numerous representations of

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO ITS MOTION FOR RECONSIDERATION - 8

Esposito that he intended to convey Lot 39, Block 1 to the Greenbriar Homeowners, members of the Nampa Planning and Zoning Department and the City of Nampa approved Esposito's plat, stating that if he had represented otherwise, the plat would not have been approved. That is, through the plat approval process, based on the four corners and three versions of the plat submitted to the City of Nampa, Esposito clearly and unequivocally manifested an intent to convey the land pursuant to the plat, which plat was accepted and approved by the City of Nampa and Esposito sold lots in the Greenbriar subdivision with reference to the plat, knowing that potential owners could and would rely upon the positive assertions in the recorded plat including that the storage areas would be owned and maintained by the homeowner's association. In doing so, Esposito at the very least dedicated Lot 39, Block 1 to Greenbriar Homeowners. *See Saddlebrook, supra.*

Esposito goes on to argue that because homeowners had knowledge of the CC&Rs, and because they did not know until later about the proceedings in front of the City of Nampa, that they somehow "waive" any argument that Esposito dedicated Lot 39, Block 1. As set forth above, there is no legal authority to support such a conclusion. In sum, Esposito is arguing that he can represent to the world that he intends to convey and/or dedicate certain lots to the Greenbriar Homeowners, file a plat representing the same, and convey lots with reference to the plat representing the same, but if he drafts CC&Rs to the opposite, he is under no obligation honor his dedication. Such is not the law and such action should not be condoned by this Court.

II.

CONCLUSION

Based on the foregoing, the Greenbriar Homeowners respectfully request that the Court reconsider its earlier order and deny Esposito's Motion for Partial Summary Judgment.

DATED THIS 17th day of November, 2009.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Michelle R. Points, ISB No. 6224
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of November, 2009, I caused to be served a true copy of the foregoing DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO ITS MOTION FOR RECONSIDERATION by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☒ E-mail
☒ Telecopy: 208.338.3290


Michelle R. Points

DEFENDANT/COUNTERCLAIMANT GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC.'S MEMORANDUM IN REPLY TO PLAINTIFFS' OPPOSITION TO
ITS MOTION FOR RECONSIDERATION - 10

DEC 04 2009

CANYON COUNTY CLERK
H. J. HEIDEMAN, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF IDAHO
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited liability company; and JOHN ESPOSITO, an individual,

Plaintiffs/Counterdefendants,

VS.

GREENBRIAR ESTATES
HOMEOWNERS' ASSOCIATION, INC.,
an Idaho non-profit corporation; DEBRA
HOBBS a/k/a DEBBIE HOBBS, an
Individual d/b/a ACTION ASSOCIATION
MANAGEMENT COMPANY,

Defendants/Counterclaimants.

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)
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) CASE NO. CV 2008-9740
)
) MEMORANDUM DECISION UPON
) DEFENDANTS' MOTION FOR
) RECONSIDERATION

This matter came on for hearing on November 19, 2009. Appearing was the plaintiff, John Esposito, represented by his legal counsel, David M. Penny. Appearing on behalf of the defendants was Michelle R. Points. The Court heard oral argument and has reviewed the memoranda submitted on behalf of the parties. The court's decision on the motion is set forth below.

Procedural History:

On September 21, 2009, this Court entered its Memorandum Decision granting summary judgment on Count I of the plaintiffs' Complaint and dismissing the Counterclaims of the defendants. On October 5, 2009, Defendants/Counterclaimants Greenbriar Estates Homeowners' Association, Inc., (hereinafter "HOA") filed its Motion for Reconsideration pursuant to Idaho Rule of Civil Procedure 11(a)(2)(B) asking the court to reconsider its decision. In particular, HOA requests that the Court reconsider its finding that HOA failed to advance a viable theory of

MEMORANDUM DECISION UPON DEFENDANTS'
MOTION FOR RECONSIDERATION

ownership of Lot 39, Block 1. HOA asserts that the Court overlooked HOA's legal arguments and numerous issues of fact which should have precluded the Court from granting Plaintiffs' motion for partial summary judgment.

STANDARD OF REVIEW

I.R.C.P. 11(a)(2)(B) allows a party to seek reconsideration of a decision on an interlocutory order prior to the entry of a final judgment, or within fourteen (14) days of entry of the final judgment. An order is deemed interlocutory until entry of a final judgment or entry of an I.R.C.P. 54(b) certificate. *Noreen v. Price Development Co. Ltd. Partnership*, 135 Idaho 816, 820, 25 P.3d 129, 133 (Ct. App. 2001). See also, *Idaho First Nat'l Bank v. David Steed & Assoc., Inc.*, 121 Idaho 356, 825 P.2d 79 (1992). In this case, no final judgment has been entered and the Defendants timely filed the motion for reconsideration. Therefore, I.R.C.P. 11(a)(2)(B) is the proper procedural avenue for Defendants to pursue their motion for reconsideration.

The decision to grant or deny a motion for reconsideration is squarely within the court's discretion. *Puckett v. Verska*, 144 Idaho 161, 166, 159 P.3d 937, 942 (2007). Abuse of discretion is determined by a three part test which asks whether the district court "(1) correctly perceived the issue as one of discretion; (2) acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) reached its decision by an exercise of reason." *Straub v. Smith*, 145 Idaho 65, 71, 175 P.3d 754, 760 (2007) (citation omitted).

When faced with a motion for reconsideration, the court is directed to consider any new facts presented by the moving party that provide insight into the correctness of the order to be reconsidered. *Coeur d'Alene Mining Co. v. First Natl. Bank*, 118 Idaho 812, 823, 800 P.2d 1026, 1037 (1990). It is the burden of the moving party seeking reconsideration to place those new facts before the court for reconsideration. *Id.* While a party may properly present new evidence on an I.R.C.P. 11(a)(2)(B) motion for reconsideration, the rule does not require new evidence and the lack of new evidence alone does not act as an automatic denial of the motion for reconsideration but a trial court acts within the bounds of its discretion in denying a motion for reconsideration when a moving party either fails to provide new evidence or fails to direct the court to evidence already in the record that would raise a genuine issue of material fact. *Johnson v. Lambros*, 143 Idaho 468, 472-473, 147 P.3d 100, 104-105 (Ct. App. 2006).

MEMORANDUM DECISION UPON DEFENDANTS'
MOTION FOR RECONSIDERATION

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Summary judgment is proper when “the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” I.R.C.P. 56(c); *see also West Wood Investments, Inc. v. Acord*, 141 Idaho 75, 82, 106 P.3d 401, 409 (2005). To withstand a motion for summary judgment, the non-moving party’s case must be anchored in something more solid than speculation. A mere scintilla of evidence is not enough to create a genuine issue. *Edwards v. Conchemco Inc.*, 111 Idaho 851, 853, 727 P.2d 1279, 1281 (Ct. App. 1986).

In a motion for summary judgment, this Court should liberally construe all facts in favor of the nonmoving party and draw all reasonable inferences from the facts in favor of the nonmoving party. *West Wood Investments, Inc.*, 141 Idaho at 82, 106 P.3d at 409. Summary judgment must be denied if reasonable persons could reach differing conclusions or draw conflicting inferences from the evidence presented. *Id.* (citations omitted); *see also Willie v. Bd. of Trustees*, 138 Idaho 131, 133, 59 P.3d 302, 304 (2002)).

A trial court, in ruling on a motion for summary judgment, is not to weigh evidence or resolve controverted factual issues. *American Land Title Co. v. Isaak*, 105 Idaho 600, 601, 671 P.2d 1063, 1065 (1983) (citations omitted).

The existence of disputed facts will not defeat summary judgment when the plaintiff fails to make a showing sufficient to establish the existence of an element essential to his case, and on which he will bear the burden of proof at trial. *Garzee v. Barkley*, 121 Idaho 771 (Ct. App. 1992) (citations omitted). Facts in dispute cease to be “material” facts when the plaintiff fails to establish a prima facie case. *Id.* In such cases, there can be “no genuine issue of material fact,” since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial. *Id.* (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-323, 106 S. Ct 2548, 2552, 91 L.3d.2d 265 (1986)).

Summary judgments should be granted with caution. *Bonz v. Sudweeks*, 119 Idaho 539, 808 P.2d 876 (1991) (citations omitted). If the record contains conflicting inferences or reasonable minds might reach different conclusions, a summary judgment must be denied. *Id.*

ANALYSIS

Defendants’ motion asks that the Court reconsider its prior Memorandum Decision on
MEMORANDUM DECISION UPON DEFENDANTS’
MOTION FOR RECONSIDERATION

Plaintiffs' Motion for Partial Summary Judgment entered on September 21, 2009. The defendants' motion raises five issues: (1) the HOA's fraudulent misrepresentation claim is based on the representations made in the CC&Rs, not to the City of Nampa; (2) the Court's finding that the "correction" to the Plat was amendment is erroneous; (3) the warranty deeds do not circumvent the common law dedication; Esposito did dedicate Lot 39; (4) the restatement dictates conveyance of a common area; and (5) Esposito dedicated the Lot 39, or alternatively, there is an issue of fact as to whether he dedicated Lot 39. The court will address these issues in reverse order.

I. Common Law Dedication

HOA asserts that there are numerous issues of fact with regard to the issue of common law dedication which preclude the entry of partial summary judgment in this case. In support of this assertion, HOA directs the Court to the circumstances surrounding the approval of the Plat, specifically, the submission of three (3) plats during various stages of the planning and zoning approval process. In addition, HOA points to the Articles of Incorporation which appear to include Lot 39, Block 1 as a common area. HOA argues that Esposito's claim that the inclusion of Lot 39, Block 1 as a common area was a mistake is clearly an issue of fact. In sum, HOA argues that "[a]ll actions taken by Esposito were consistent with the HOA owning Lot 39, Block 1 as a common area and amenity to the Subdivision and certainly create an issue of fact." (Memorandum in Support of Motion for Reconsideration, pg. 14).

The plaintiff responds by arguing that although there may be issues of fact with regard to the Plat approval process, those issues cease to be material upon HOA's failure to establish a prima facie case of common law dedication and that therefore, summary judgment on the issue of common law dedication is proper.

The determination of common law dedication is a question of law. *West Wood Investments Inc.*, 141 Idaho at 87, 106 P.3d at 413. To establish common law dedication, a two prong test must be met: "(1) an offer by the owner clearly and unequivocally indicating an intent to dedicate the land and (2) an acceptance of the offer." *Saddlehorn Ranch Landowner's Inc., v. Dyer*, 146 Idaho 747, 751-752, 203 P.3d 677, 681-682 (2009) (quoting *Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc.*, 143 Idaho 407, 409, 146 P.3d 673, 675 (2006)). The party alleging that an act or omission manifested an intent to dedicate must show that the offer for

dedication was clear and unequivocal, thereby indicating the owner's intent to dedicate the land. *Id.* (citations omitted). "[W]hen an owner of land plats the land, files the plat for record, and sells the lot by reference to the recorded plat, a dedication of public areas indicated by the plat is accomplished." *Id.* (quoting *Monaco v. Bennion*, 99 Idaho 529, 533, 585 P.2d 608, 612 (1978)).

"The offer to dedicate may be made in a number of ways, including the act of recording or filing a subdivision plat depicting the specific areas subject to dedication, so long as there is a clear and unequivocal indication the owner intends to dedicate the land as depicted ... In determining whether the owner intended to offer the land for dedication, the court must examine the plat, as well as 'the surrounding circumstances and conditions of the development and sale of lots.'"

Ponderosa Homesite Lot Owners v. Garfield Bay Resort, Inc., 143 Idaho at 409, 146 P.3d at 675 (2006) (quoting *Sun Valley Land and Minerals Inc. v. Hawkes*, 138 Idaho 543, 548, 66 P.3d 798, 803 (2003)). The purpose of the doctrine of common law dedication is to protect the interests of purchasers who rely solely on the value of the public areas as reflected in the plat. *Saddlehorn*, 146 Idaho at 752, 203 P.3d at 682 (citations omitted).

The common theme of the Idaho Supreme Court cases interpreting the doctrine of common law dedication is the protection of purchasers. Whether those purchasers relied on the plat, oral representations, existing roadways, or CC&Rs the Court's analysis consistently focuses on expectation of the purchasers based on the particular facts of each case. In some cases, the Court has found that the filing of a plat is sufficient to give rise to a common law private dedication. See *Monaco*, 99 Idaho at 533, 585 P.2d at 612 ("It is presumed that the existing private roadway added value to all of the lots embraced in the general plan of the plat, and that purchasers invested upon the faith of the assurance that such access ways ... would not remain the totally private property of the owner"); *Smylie v. Pearsall*, 93 Idaho 188, 191-192, 457 P.2d 427, 430-431 (1969) (Where the parties take title by deeds referring only to a plat, absent other evidence, a dedication of streets, alleys, parks or other open spaces is accomplished ... "It is presumed that ... purchasers invest their money upon the faith of this assurance that such open spaces, particularly access ways, are not to be the private property of the seller.")).

In *Monaco* lot owners brought an action to enforce their right to access an existing private roadway that was listed on the plat but not clearly marked. *Monaco*, 99 Idaho at 530-531, 585 P.2d 608. The lot owners spent substantial funds improving and landscaping the roadway which

they used to access a boat ramp for nearly 11 years before the original owner erected a barricade to prevent the lot owners from using the roadway. The Court held that under these circumstances the original owner was precluded from asserting that the roadway had not been “dedicated” and that the lot owners were entitled to an easement. *Id.* at 533, 585 P.2d at 612.

Similarly, in *Smylie*, at the time the subdivision was platted a small parcel abutting the lake, just large enough to launch a boat, was left unplatted. *Smylie*, 93 Idaho at 189-190, 457 P.2d at 428-429. Deeds for lots neighboring the parcel referred only to the plat and several of the parties used the parcel as a boat launching area. *Id.* The Court found that based on the plat, the terrain and layout of the parcel in question, and the prior use of the parcel that “the overall tenor of the plat shows an intention on the part of the [original owners] to dedicate the disputed area which dedication became fixed upon the recording of the plat and the sale of [any lots].” *Id.* at 192, 457 P.2d at 431.

In another instance, the Court held that where lots are purchased “according to the official plat thereof and SUBJECT TO Declaration of Covenants, Conditions and Restrictions” the CC&Rs are to be considered in determining whether or not a common law dedication has occurred. *See Sun Valley Land and Minerals Inc.*, 138 Idaho at 548, 66 P.3d at 803. In *Sun Valley*, the lot owners argued “that the Plat, recorded and referenced in each of Lot Owners’ deeds [resulted] in the creation of vested rights by illustrating private roads and open spaces intended for the benefit of the lot owners.” *Id.* The Court expressly rejected the argument that the Plat was sufficient to find an unequivocal intent to dedicate a particular parcel finding that

“[a]fter an examination of the Plat, in light of the CC&Rs and other circumstances surrounding development at the time the Plat was made, it is clear a common law private dedication was not intended, nor should it be implied for the purpose of protecting the Lot Owners, who were informed of the risks involved in this development prior to purchasing the lot.” *Id.* at 548-549, 66 P.3d at 803-804.

Most recently in *Saddlehorn v. Dyer*, in finding that a dedication of a common area for private use had occurred, the Court held that based on the plat, CC&Rs, deeds, and actions of the developer that a clear intent to dedicate the parcel in question was established. *Saddlehorn*, 146 Idaho at 752-753, 203 P.3d at 682-683. In particular, the Court noted that the original plat referenced several “R-lots” which per the plat were to be used for, among other things, recreation areas; the CC&Rs stated that the common areas, if any, were to be owned by the homeowner’s

association; that although the plat and CC&Rs were initially drafted and filed in 1982 and 1984 respectively, the act of re-recording the plat and CC&Rs in the mid-1990s and incorporating the homeowner's association in 1994 showed a clear intent to develop the parcels as originally contemplated. *Id.* Therefore, since the developer sold lots with reference to the plat, "with the knowledge that those purchasers would rely on her acts as positive assertions that the common areas were dedicated to the Association" the Court held that the Association had a valid easement to the R-Lots *Id.*

Finally, where the recorded instruments are inconsistent there can be no clear and unequivocal intent to make an offer of dedication. *West Wood Investments Inc.*, 141 Idaho at 87, 106 P.3d at 413. In *West Wood*, the owners argued that the CC&Rs and one of three recorded plats constituted a clear and unequivocal offer of dedication. The Court held that "[w]ith regard to any offer of dedication made by [the seller] to the owners and associations ... for the owners and associations to rely on a plat that has been recorded, they must also be charged with notice of [other recorded interests]." *Id.*

The language used by the Court in framing the issue in *West Wood* is particularly useful in framing the issue in this case. In *West Wood*, the offer was framed in the context of who it was made to, specifically, the owners and associations. See *West Wood Investments Inc.*, 141 Idaho at 87, 106 P.3d at 413. The acceptance was therefore framed in the context of the actions and reliance of the purchasers. This is consistent with other Idaho case law interpreting the doctrine of common law dedication. See *Saddlehorn*, 146 Idaho 747, 203 P.3d 677; *Sun Valley*, 138 Idaho 543, 66 P.3d 798; *Middlekauff v. Lake Cascade, Inc.*, 110 Idaho 909, 719 P.2d 1169 (1986); *Monaco*, 99 Idaho 529, 585 P.2d 608. Therefore, the Court must determine whether or not an offer was made to the purchasers, and consequently, whether or not the purchasers relied on that offer in acceptance.

In its Memorandum Decision the Court held that, even viewing all reasonable inferences in favor of the HOA, the Court could not find that HOA met its burden in showing a clear and unequivocal intent to dedicate Lot 39, Block 1. In a motion for reconsideration, it is incumbent on HOA to provide new evidence or direct the court to evidence already in the record that would raise a genuine issue of material fact. See *Johnson v. Lambros*, 143 Idaho 468, 147 P.3d 100 (Ct. App. 2006).

MEMORANDUM DECISION UPON DEFENDANTS'
MOTION FOR RECONSIDERATION

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In this case, in support of its motion for reconsideration, HOA has submitted affidavits of several members of the planning and zoning commission. All state that they would not have approved the Plat had they known of Esposito's intent to retain private ownership of the storage facility. HOA asserts that Esposito made an offer to the city through his representations contained in the Plat(s) which offer was accepted upon the approval and filing of the final Plat. In addition, HOA argues that Esposito's mistake argument is not credible and that the Plat submitted is clear and unequivocal evidence of his intent to grant ownership in Lot 39 to the HOA. HOA further argues that the very essence of the doctrine of common law dedication is to prevent developers from coming forward after the dedication occurs claiming that they didn't intend to dedicate the parcel in question.

Plaintiff responds by asserting that the facts of this case defeat the purpose of the doctrine of common law dedication, that is, protection of purchasers who rely on representations contained in the Plat in evaluating whether or not to purchase a particular parcel. Therefore, the doctrine of common law dedication should not be used to provide the HOA with something more than what they believed they were purchasing. Furthermore, Plaintiff argues that the language cited by HOA pertaining to the impact of recording a plat and selling lots with reference thereto pertains to dedications of public areas, not private areas.

It is not lost on the Court that there are issues of fact surrounding the representations made to the City of Nampa Planning and Zoning Department. Furthermore in construing the record in the light most favorable to the HOA the Court recognizes that there may be an issue with regard to misrepresentations made to planning and zoning. To the extent that planning and zoning may feel misled by the actions undertaken by Esposito, any cause of action related to those representations is not before this court. The issue before this court is not whether Esposito committed a fraud upon the planning and zoning commission in an attempt to gain approval of his Plat, rather the issue before the Court is whether a common law dedication was accomplished upon the act of recording the Plat.

The representation to the Planning and Zoning commission, and the subsequent approval of the Plat is but one facet of the totality of the circumstances inquiry. The Court is directed to consider all circumstances surrounding the development of the subdivision, including but not limited to the CC&Rs. In addition, the Court is to consider the offer and acceptance in the

context of what the purchasers relied upon in purchasing their lots within the subdivision.

In this case, the deeds referenced inconsistent recorded documents. As the Court stated in *West Wood*, where there are conflicting representations contained in recorded instruments, there can be no clear and unequivocal intent to dedicate. *West Wood Investments Inc.*, 141 Idaho at 87, 106 P.3d at 413. The same is true in this case. The purchasers took their parcels according to the Plat, and subject to the CC&Rs. The Court cannot find that conflicting inferences are sufficient to constitute a clear and unequivocal intent to dedicate Lot 39, Block 1.

Likewise, viewing the offer in the context of the purchasers, there can be no acceptance of that offer where the buyers concede that they believed that Lot 39, Block 1 was privately owned by Esposito. The buyers clearly did not purchase in reliance upon representations that Lot 39, Block 1 was to be a common area.

For the above mentioned reasons, the Court must look beyond the platting process to find a clear and unequivocal intent to dedicate Lot 39, Block 1. Thus, although there may be issues of fact pertaining to the representations made to the planning and zoning commission, those issues of fact are not material to offer and acceptance vis-à-vis the developer and the purchasers. Therefore, HOA has failed to come forward with new evidence or direct to the Court to existing evidence in the record that raises a genuine issue of material fact on the issue of common law dedication.

II. Restatement Approach

HOA argues that upon a finding of common law dedication that the restatement dictates conveyance to HOA. HOA's memorandum in support of its motion for reconsideration states "the Court finds that if there was a common law dedication, then Esposito had an obligation to convey Lot 39." The Court did not intend to infer that it would apply the restatement approach. The Court is mindful of the fact that there is no case law in Idaho supporting this approach. Rather, the Idaho case law on the issue of common law dedication is clear: a common law dedication creates an easement, not ownership. Therefore, the Court declines to adopt the restatement approach as it is inconsistent with Idaho law on this issue.

III. The Warranty Deeds Do Not Circumvent the Common Law Dedication; Esposito Did Dedicate Lot 39

HOA argues that the CC&Rs cannot affect a completed common law dedication.

Specifically, that the CC&Rs are not a document of conveyance and that the CC&Rs cannot be used to trump a valid dedication. The Court does not hold that CC&Rs can circumvent a completed common law dedication. However, the Court is directed to consider the contents of the Plat, the CC&Rs, and the totality of the circumstances, in determining whether or not the developer has clearly and unequivocally manifested an intent to dedicate a particular parcel. To the extent that the Court relies on the CC&Rs to support a finding that there was no common law dedication, the Court is instructed to analyze the offer and acceptance in the context of the representations made by the developer that induced reliance on the part of the purchasers, in this case HOA.

IV. The Court's Finding that the "Correction" to the Plat was Amendment is Erroneous.

HOA argues that there is no legal authority to support Esposito's argument that the "correction" was a valid amendment. In support of its motion for reconsideration HOA submits the affidavit of John Priester, engineer and surveyor, who states that he is unaware of any statute, ordinance, or other law that allows for a "correction" to a plat to vest or divest ownership. The Court notes that neither party has submitted a statute, ordinance, nor case law on what the proper avenue for amending a plat requires.

The Court's statement that "the original plat has been corrected" was in error. The line cited by the HOA was part of the Court's recitation of the facts and the Court did not intend to indicate that it perceived the "correction" as a valid amendment, only that although a correction had been made to the Plat, Exhibit B containing the legal description and the Plat affixed to the CC&Rs had not been modified in any way. (See Memorandum Decision, page 3.) The Court's legal analysis did not refer to or rely on the "correction" as legally significant on the issue of common law dedication, fraudulent misrepresentation, or the restatement approach.

V. HOA's Fraudulent Misrepresentation Claim is Based on the Representations Made in the CC&Rs – Not to the City of Nampa.

HOA argues that the representations contained in the CC&Rs were fraudulent. Specifically, that since Esposito effectively dedicated Lot 39, Block 1 during the platting process that any subsequent representations to the contrary were fraudulent. HOA asserts that it relied on the fraudulent representations contained in the CC&Rs and that it suffered damages in the amounts paid to Esposito. HOA requests relief in the form of quiet title to Lot 39, Block 1.

HOA has conceded that Idaho law limits its remedy to an easement upon a finding of common law dedication. HOA argues that even if HOA is not entitled to fee ownership that the easement created upon the filing of the Plat contradicts Esposito's representation in the CC&Rs that Lot 39, Block 1 was privately owned.

The burden is on the HOA to plead with particularity the elements of fraud, of which there are eight (8). The Court is cognizant of the fact that the Court's Memorandum Decision mainly addressed the elements of fraud as applied to Esposito's interactions with planning and zoning. Therefore, the Court will address the elements of fraud with respect to Esposito's representations contained in the CC&Rs. A showing of fraud requires that HOA relied upon and suffered an injury as a result of Esposito's intentional acts of deception. Esposito is the titled owner of Lot 39, Block 1. Based upon the Court's conclusion that no common law dedication occurred, the Court cannot find that any representation of private ownership was false. Furthermore, the element of reliance is a key issue in this case. The HOA relied upon the representation that Lot 39, Block 1 was private and paid rents accordingly. The Court cannot find that HOA relied upon the CC&Rs to its detriment. HOA paid for exactly what it got in return, the use of a storage unit.

HOA seeks an equitable remedy for Esposito's actions before planning and zoning which HOA argues created certain rights in HOA. However, HOA has provided no case law to support an argument that a misrepresentation is grounds for divesting a party of ownership.

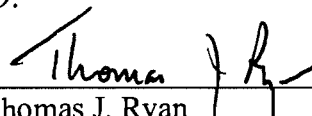
Conclusion

The burden is on the party seeking reconsideration to provide new evidence or direct the court to evidence already in the record that would raise a genuine issue of material fact. The defendants have not met this burden, and accordingly, the motion for reconsideration is DENIED.

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that Defendants' Motion for Reconsideration be DENIED.

Dated this 4th day of December, 2009.



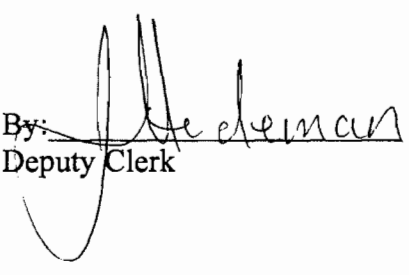
Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision was mailed, postage prepaid, to the following persons on this 4 day of December, 2009.

DAVID M. PENNY
COSHO HUMPHREY, LLP.
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518

MICHELLE R. POINTS
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617

By: 
Deputy Clerk

F I L E D
A.M. 4:54 P.M.

JAN 11 2010

CANYON COUNTY CLERK
K CANNON, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiff s/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

MOTION FOR RULE 54(b)
CERTIFICATE

COMES NOW Defendant/Counterclaimant Greenbriar Estates Homeowners'

Association, Inc. ("Greenbriar"), by and through its counsel of record, and respectfully moves
this Court for a Rule 54(b) Certificate on the issues ruled upon in its Memorandum Decision
Upon Defendants' Motion for Reconsideration, entered December 4, 2009.

MOTION FOR RULE 54(b) CERTIFICATE - 1

The basis of this Motion is that the Court rendered a final ruling based on its interpretation of the record in the case and there is no reason to delay final judgment on the issues settled by the Court in granting Plaintiff/Counterdefendant's motion for partial summary judgment.

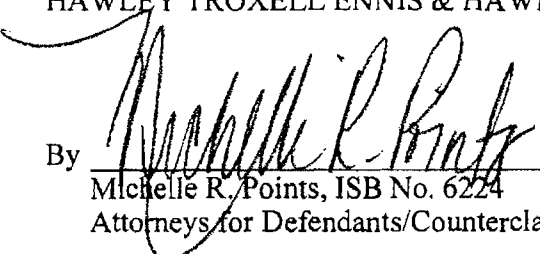
This Motion is supported by the Memorandum in Support of Motion for Rule 54(b) Certification, filed herewith.

A proposed Rule 54(b) Certificate is also filed herewith for the Court's convenience.

DATED THIS 11th day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Michelle R. Points, ISB No. 6224
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2010, I caused to be served a true copy of the foregoing MOTION FOR RULE 54(b) CERTIFICATE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Telecopy: 208.338.3290



Michelle R. Points

FILED
A.M. 4:54 P.M.

JAN 11 2010

CANYON COUNTY CLERK
K CANNON, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiff s/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

RULE 54(b) CERTIFICATE

With respect to the issues determined by the Memorandum Decision Upon Defendants'
Motion for Reconsideration, entered December 4, 2009, that order is hereby CERTIFIED, in
accordance with Rule 54(b), I.R.C.P., that the Court has determined that there is no just reason
for delay of the entry of a final judgment and that the Court has and does hereby direct that the

above judgment or order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

DATED THIS _____ day of _____, 2010.

Thomas J. Ryan
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of January, 2010, I caused to be served a true copy of the foregoing RULE 54(b) CERTIFICATE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

____ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy: 208.338.3290

Michelle R. Points
HAWLEY TROXELL ENNIS & HAWLEY LLP
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendants]

____ U.S. Mail, Postage Prepaid
____ Hand Delivered
____ Overnight Mail
____ E-mail
____ Telecopy

CLERK OF THE COURT

By: _____
Deputy Clerk

F I L E D
A.M. 4:54 P.M.

JAN 11 2010

CANYON COUNTY CLERK
K CANNON, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiff s/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
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HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

MEMORANDUM IN SUPPORT OF
MOTION FOR RULE 54(b)
CERTIFICATE

Defendant/Counterclaimant Greenbriar Estates Homeowners' Association, Inc.

("Greenbriar Homeowners"), by and through its counsel of record, respectfully submits this
Memorandum in Support of its Motion for Rule 54(b) Certification of the order granting
Plaintiffs/Counterdefendants Asbury Park, LLC and John Esposito's (collectively "Esposito")
motion for partial summary judgment.

MEMORANDUM IN SUPPORT OF MOTION FOR RULE 54(b) CERTIFICATE - 1

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I.**RELEVANT FACTS AND PROCEDURAL POSTURE**

Through this motion, the Greenbriar Homeowners seek an order from the Court certifying that the Court's order granting Esposito's Motion for Partial Summary Judgment, confirmed in the Memorandum Decision upon Defendants' Motion for Reconsideration (the "Memorandum Decision"), is final and appealable based on the record in this case.

The crux of this case rests on the determination of ownership interest in Lot 39, Block 1. As the Court is aware, it is Greenbriar Homeowners' assertion that Lot 39, Block 1 is owned by the Greenbriar Homeowners (based on the argument that Esposito should have conveyed in fee to the Greenbriar Homeowners Lot 39, Block 1 when he turned over the subdivision), or alternatively, that the Greenbriar Homeowners have an easement to use, operate and maintain Lot 39, Block 1 (based on the argument that Esposito dedicated Lot 39, Block 1 to the Greenbriar Homeowners).

In the Memorandum Decision, the Court held that there was no issue of material fact and found as a matter of law, that Esposito did not dedicate Lot 39, Block 1 to the Greenbriar Homeowners and; that the Greenbriar Homeowners have no interest in Lot 39, Block 1, in fee or through an easement.

According to the Court's ruling, the Greenbriar Homeowners have no basis to assert *any* claim against Esposito regarding the ownership and control of Lot 39, Block 1 and that the Greenbriar Homeowner's have no defense to Esposito's claim for breach of contract for failure to pay rents on the storage units located on Lot 39, Block 1. Although there other claims at issue in

Esposito's case in chief¹, the issue of his ownership interest in Lot 39, Block 1 is dispositive as to Greenbriar Homeowners' Counterclaim and the majority of Esposito's claims.

II.

RULE 54 CERTIFICATION IS WARRANTED IN THIS CASE

Idaho Rule of Civil Procedure 54(b) provides:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment ...

"In order for a partial summary judgment to be certified as final and appealable under I.R.C.P. 54(b), the order granting partial summary judgment must finally resolve one or more of the claims between the parties." *Brinkmeyer v. Brinkmeyer*, 135 Idaho 596, 21 P.3d 918 (2001), citing *Toney v. Coeur d'Alene School Dist. No. 271*, 117 Idaho 785, 786, 792 P.2d 350, 351 (1990). "The purpose of Rule 54(b) is to avoid piecemeal appeals." *Id.*

In addition, a party may permissively appeal an interlocutory order under Idaho Appellate Rule 12. *See Merritt v. State*, 113 Idaho 142, 742 P.2d 397 (1986) (district court certified denial of motion for summary judgment, appeal accepted as permissive appeal of interlocutory order); *see also North Pacific Ins. Co. v. Mai*, 130 Idaho 251, 939 P.2d 570 (1987) (because "trial

¹ The counts contained in Esposito's complaint are as follows: breach of contract related to the payment of rent on the storage units; fraud in the inducement and breach of contract related to the status of a document referenced as "The First Supplement", which would bring the former Assisted Living Facility lot, now 17 residential lots, into the Greenbriar Homeowners; quiet title of Lot 39, Block 1; slander of title against the Greenbriar Homeowners; and defamation against the Greenbriar Homeowners and Ms. Hobbs.

court's decision involves a controlling question of law as to which there is substantial grounds for difference of opinion and because an immediate appeal may materially advance the orderly resolution of the litigation" the appeal was considered and treated as permissive appeal); *see also Idaho Department of Labor v. Sunset Marts, Inc.*, 140 Idaho 207, 91 P.3d 1111 (2004) (appeal from an order of partial summary judgment, striking the affirmative defenses of comparative fault raised by defendants who were alleged to have sold or furnished alcoholic beverages to an obviously intoxicated driver, was proper as a permissive appeal despite the fact it was not certified under 54(b)).

In *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Ct. App. 1995), plaintiffs brought a personal injury action against a defendant who had rear-ended the vehicle they were driving. Defendant brought a motion for summary judgment based on a previous settlement agreement, and plaintiffs moved to set aside that agreement. The District Court held that the parties had entered into a settlement agreement but found summary judgment was precluded "because there remained a genuine issue of material fact bearing upon plaintiffs' contention that the settlement agreement was unenforceable and should be set aside." The District Court entered a partial summary judgment and issued an I.R.C.P. 54(b) certificate. Both parties appealed. The Court of Appeals held that a partial summary judgment was properly certified by the trial court as final, that the order of partial summary judgment qualified as an appealable order under Idaho Appellate Rule 11(a)(3) and that the order was properly reviewable by the appellate court. *Id.* at 154, 898 P.2d at 85.²

In *Provident Federal Savings and Loan Ass'n. v. Idaho Land Developers*, 114 Idaho 453, 757 P.2d 716 (Ct. App. 1988), the District Court had entered partial summary judgment declaring that, pursuant to a subordination agreement, the lender had prior lien status over a deed of trust recorded earlier and the purchasers appealed. The Court of Appeals held that a lower court may abuse its discretion in *denying* a motion for certification, where there is no showing of hardship or injustice by the opposing party if certification is granted. *Id.* at 454, 757 P.2d at 719. In *Idaho Land Developers*, however, the District Court was found to have properly issued the certification, "determining there was no just reason for delaying final judgment on the issues settled by the partial summary judgment." *Id.*

An interlocutory appeal advances the orderly resolution of the litigation. In this case, an appeal regarding ownership and control addresses the controlling question of law and furthers resolution of all claims at issue. There is no just reason for delaying final judgment on the issues settled by the ruling on partial summary judgment.

Although there is more than one claim for relief presented in this action, the Court can and should direct entry of a final judgment on the issue of the ownership and control of Lot 39, Block 1, as all other claims are arguably peripheral to that sole issue.

The Court's decision on Esposito's motion for partial summary judgment involves a controlling question of law as to which there is substantial grounds for a difference of opinion of which an immediate appeal may materially advance the orderly resolution of the litigation. There is no reason to delay final judgment on appeal on the issues settled by the partial summary judgment. It is an appealable order under Idaho Appellate Rule 11(a)(3) and granting certification will finally several of the claims between the parties.

Wherefore, Defendant/Counterclaimant respectfully requests that the Court grant this motion for certification under I.R.C.P. 54(b) so that it may seek a final judgment on appeal.

RESPECTFULLY SUBMITTED THIS 14th day of January, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By 

Michelle R. Points, ISB No. 6224

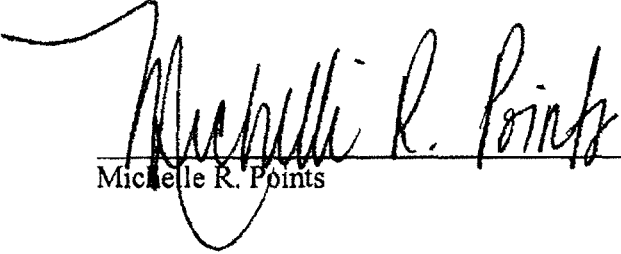
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of January, 2010, I caused to be served a true copy of the foregoing MEMORANDUM IN SUPPORT OF MOTION FOR RULE 54(b) CERTIFICATE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
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Michelle R. Points

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

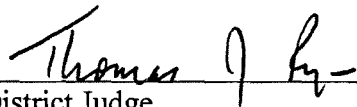
Decision denying Defendants' motion for reconsideration. This Order follows.

Plaintiffs' Motion for Partial Summary Judgment requests judgment on Count I of Plaintiffs' Complaint and dismissal of Defendants' Counterclaims in their entirety. The sole issue resolved by the Court in its Memorandum Decision Upon Plaintiffs' Motion for Partial Summary Judgment and Memorandum Decision Upon Defendants' Motion for Reconsideration was the ownership of Lot 39, Block 1. The Court did not consider the amount of damages to which the plaintiffs might be entitled or the issue of prejudgment interest. Therefore,

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that Plaintiff Asbury Park, LLC shall have judgment against Defendant Greenbriar Estates Homeowners' Association Inc., on the sole issue of ownership of Lot 39, Block 1 of the Greenbriar Estates Subdivision. Accordingly, the counterclaims of the defendant are hereby DISMISSED.

Dated this 21st day of January, 2010.



District Judge

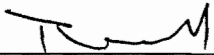
CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing to be served upon the following via U.S. Mail, postage prepaid, facsimile transmission or by hand delivery:

DAVID M. PENNY
COSHO HUMPHREY, LLP.
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518

MICHELLE R. POINTS
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617

1-22-10
Date


Deputy Clerk

FILED
9:00 A.M. P.M.

FEB 10 2010

CANYON COUNTY CLERK
K CANNON, DEPUTY

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs,

DAVID M. PENNY
COSHO HUMPHREY, LLP
800 PARK BLVD.
BOISE, IDAHO 83712
ESPOSITO ESTATES
HOMEOWNERS' ASSOCIATION, INC.,
an Idaho non-profit corporation; DEBRA
HOBBS a/k/a DEBBIE HOBBS, an
individual d/b/a ACTION ASSOCIATION
MANAGEMENT COMPANY.

Defendant.

Case No. CV 08-9740*C

**PLAINTIFFS' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION FOR RULE 54(b)
CERTIFICATE**

I. INTRODUCTION

On September 21, 2009, the Court entered its Memorandum Decision granting partial summary judgment to the Plaintiffs. On December 4, 2009, the Court entered a Memorandum Decision denying the Defendants' Motion for Reconsideration.

DAVID M. PENNY
COSHO HUMPHREY, LLP
800 PARK BLVD.
BOISE, IDAHO 83712
MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR RULE 54(b) CERTIFICATE P -1-
DMP/US 2007-001/533718

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On January 11, 2010, the Defendants filed a motion asking that the Court enter a judgment and then certify the judgment as final, apparently so that the Defendants can appeal from the District Court's decision and use the appeal to deprive the District Court of jurisdiction over the remaining unresolved claims.

On January 22, 2010, this Court entered an Order directing Judgment against the Defendants on the sole issue of ownership of Lot 39, Block 1 of the Greenbriar Estates Subdivision." The order did not resolve any other issues. The judgment entered by the Court does not contain a Rule 54(b) Certificate. Currently, Defendants have a hearing on their Motion for Rule 54(b) Certificate scheduled for February 18, 2010. The Defendants' request is an extraordinary procedural step that is reserved for the rarest of cases. Proper analysis of this case and the case law cited by Defendants shows that the Defendants' motion must be denied.

II. ARGUMENT

A. Issuance of a Rule 54(b) Certificate is Reserved for Exceptional Cases.

The general rule is that a case is ripe for appeal when the entire controversy between the parties has been litigated to a conclusion. *Robertson v. Richards*, 118 Idaho 791, 800 P.2d 678 (1990). The orderly and efficient administration of cases within the judicial system is furthered when piecemeal litigation and appeals can be avoided. *Reeves v. Reynolds*, 112 Idaho 573, 733 P.2d 795 (Idaho Ct.App. 1987).

The fact that Rule 54(b) certification is reserved for the rarest of cases is evident from the language of the rule. Certification of a partial judgment as final when less than all of the claims are adjudicated is reserved for that rare case where "there is no just reason for delay... ."

As the party advocating for Rule 54(b) certification, the Defendants must show the Court that there is no just reason for delaying entry of judgment. Idaho courts have commented that 54(b) certification is only appropriate where necessary to avoid an injustice. *Robertson v. Richards*, supra; *Joyce Livestock Co. v. Hulet*, 102 Idaho 129, 627 P.2d 308 (1981) (54(b) certification is only justified where injustice would result from not making the certification.)

While the ownership of Lot 39 was an important issue for determination between the parties, it is far from the only issue in the case. Plaintiffs' complaint contains the following

counts:

Count I – Breach of Contract Against HOA

Count II – Fraud in the Inducement Against HOA and Debbie Hobbs

Count III – Breach of Contract by HOA Regarding First Supplement

Count IV – Quiet Title Action Against HOA

Count V – Slander of Title Action Against HOA

Count VI – Defamation of Plaintiffs by HOA and Hobbs

Unresolved in this case are claims pertaining to the Plaintiffs' attempts to develop and sell seventeen (17) lots and the intentional conduct of the Defendants to prevent the development and sale of those lots, to the Plaintiffs' injury. As part of that same effort, the Defendants recorded documents in the records of Canyon County, Idaho to slander and encumber the lots that the Plaintiffs wish to develop and sell. In addition, the Defendants made untrue statements about the Plaintiffs before the Nampa City Council for the same purpose.

These claims are extremely important to the Plaintiffs and are not resolved by the Court's determination with regard to ownership of Lot 39. This case is currently set for trial on September 13, 2010. The Plaintiffs need resolution to the issues over the seventeen (17) lots since the Plaintiffs are damaged by their inability to sell those lots. I.R.C.P. 54(b)(2) expressly provides that if a Rule 54(b) certificate is issued, then the District Court loses all jurisdiction over the entire case, which would effectively prevent the trial and a timely resolution of these additional issues that are important to the Plaintiffs.

The simple fact that the Defendants hinged their entire position in this case on the erroneous proposition that they owned Lot 39 is not a basis for issuance of a Rule 54(b) certificate. The fact that they did not prevail on that issue and still believe they are right does not equate to the hardship or injustice necessary to support a Rule 54(b) certificate. The cases cited by the Defendants in support of their motion actually do not provide the support they suggest to this Court. Defendants cite the Court to the case of *Hess v. Wheeler*, 127 Idaho 151, 898 P.2d 82 (Idaho Ct.App. 1995) for the proposition that the Appellate Court approved of the Rule 54(b) certification made by the District Court in that case. In fact, the Idaho Court of Appeals stated, "Nor do we decide whether the I.R.C.P. 54(b) certificate was improvidently granted in this case, as the issue is not before us." 127 Idaho at 154.

Defendants cite the case of *Provident Federal Savings and Loan Assn. v. Idaho Land Developers, Inc.*, 114 Idaho 453, 757 P.2d 716 (Idaho Ct.App. 1988), however the Defendants misread the case. Defendants suggest that the Appellate Court placed the burden on the party opposing the Rule 54(b) Certificate to show that they would suffer hardship or injustice from the entry of the Certificate.

certification. To the contrary, the Idaho Court of Appeals in accordance with I.R.C.P. 54(b) stated just the opposite. The Court stated, "Abuse of discretion may exist where no hardship, injustice or other compelling reason is shown for certification." Citing *Milbank Mutual Insurance Co. v. Carrier Corp.*, 112 Idaho 27, 730 P.2d 947 (1986). "The court then reviewed the record "to determine whether hardship, injustice or other compelling reasons exist." 114

The court went on to find that Rule 54(b) certification was appropriate for the reasons that: (1) the summary judgment only involved questions of law, (2) no facts were in dispute, (3) all issues between plaintiff and the defendants were resolved on the summary judgment; and (4) only the cross-claims between the defendants remain adjudicated. 114 Idaho at 455.

The case before this Court is very different. There is not final resolution of any one count or claim between the parties and there are many unresolved claims remaining for trial. The Court's summary judgment resolved the issue over ownership of Lot 39, however, the Court's order entering judgment in this matter on January 22, 2010 made it clear that the Court had not resolved the issue of damages arising from Count I of the Plaintiff's Complaint.

Idaho of the Defendants' motivation to seek Rule 54(b) certification is readily apparent. They wish to prevent the Plaintiffs from reaching the remainder of their important and meritorious claims and having to prepare for trial. The Defendants wish to cut directly to "Round 2" on the Lot 39 issue that they feel is most important. There is no information supplied to this Court or even an argument advanced that granting Rule 54(b) certification would eliminate the risk of future appeals in this case.

II. CONCLUSION

The Court entered its judgment on January 22, 2010 which leaves the issue of damages unresolved on Count I of the Plaintiffs' Complaint and all the remaining counts of the complaint unresolved. Defendants seek to appeal a small part of the case and effectively prevent the Plaintiffs from seeking recovery on all of their counts on a timely basis. Defendants have made no showing of injustice or hardship as required to support their motion.

DATED this 10 day of February, 2010.

COSHO HUMPHREY, LLP



DAVID M. PENNY
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 10 day of February, 2010, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P.O. Box 1617
Boise, ID 83701-1617
Served by: Facsimile (954-5252)



DAVID M. PENNY

I HEREBY
the within and

Michelle
Hawley T

F I L E D
A.M. 4:20 P.M.

FEB 16 2010

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

REPLY TO PLAINTIFFS' OPPOSITION
TO GREENBRIAR HOMEOWNERS'
MOTION FOR RULE 54(b)
CERTIFICATE

Greenbriar Estates Homeowners' Association, Inc. ("Greenbriar Homeowners"), by and
through their counsel of record, Hawley Troxell Ennis & Hawley LLP, respectfully submit this
Reply to Plaintiffs' Opposition to its Motion for Rule 54(b) Certificate.

REPLY TO PLAINTIFFS' OPPOSITION TO GREENBRIAR
HOMEOWNERS' MOTION FOR RULE 54(b) CERTIFICATE - 1

As the Court is aware, through this Motion, the Greenbriar Homeowners seek an order from the Court certifying that the Court's Order granting Esposito's Motion for Partial Summary Judgment, is final and appealable based on the record in this case.

The crux of this case rests on the determination of ownership interest in Lot 39, Block 1, as that finding is intertwined with all elements of the Greenbriar Homeowners' Counterclaim, and several of the issues pertinent to Esposito's claims.

In its Order on Plaintiffs' Motion for Summary Judgment, entered January 22, 2010, the Court held that Esposito owned Lot 39, Block 1 and dismissed all Counterclaims asserted by the Greenbriar Homeowners.

In opposition to this motion, Plaintiffs/Counterdefendants (hereinafter collectively referred to as "Esposito") assert the certification of the Order on Plaintiffs' Motion for Summary Judgment is improper because the facts of this case do not come within the purview of the "rarest" or most "exceptional" or "extraordinary" cases wherein certification should be granted (a standard purportedly created by Esposito) and because Esposito asserted several causes of action in his Complaint which would – he claims – not be affected by an appeal. The Greenbriar Homeowners assert that Rule 54(b) and the cases interpreting 54(b) support certification in this case and that the decision on the appeal of the issue of ownership will have a profound impact on the remaining claims in this case.

As a preliminary matter, the decision to certify a partial summary judgment as a final order for appeal purposes rests in the trial court's discretion. *Willis v. Larsen*, 110 Idaho 818, 718 P.2d 1256 (Ct. App. 1986). A trial court's decision as to grant or deny a request for certification will not be set aside unless an abuse of discretion is shown. *Provident Federal Savings and Loan Ass'n v. Idaho Land Developers, Inc.*, 114 Idaho 453, 455, 757 P.2d 716, 718

REPLY TO PLAINTIFFS' OPPOSITION TO GREENBRIAR
HOMEOWNERS' MOTION FOR RULE 54(b) CERTIFICATE - 2

(1988) (citing *Snake River Equip. Co. v. Christensen*, 107 Idaho 541, 691 P.2d 787 (Ct. App. 1984)). Abuse of discretion may exist where no hardship, injustice or other compelling reason is shown for certification. *Id.* (citations omitted).

Contrary to the argument asserted by Esposito, the Greenbriar Homeowners have not taken the position that the party opposing certification must establish they would suffer hardship or injustice from the certification.

The facts and procedural posture of the case simply warrant certification, and the cases cited by Defendants don't change the Court's analysis.

The Greenbriar Homeowners are going to appeal the Court's decision pertaining to ownership of Lot 39, Block 1. The appeal will either take place now, or following the trial of this case. The Greenbriar Homeowners will suffer hardship and injustice if certification is not made, and the Greenbriar Homeowners have compelling reasons for going forward with appeal now instead of waiting until after trial.

Moreover, a determination of the ownership issue in an appeal will affect the merits of the claims at trial, rendering any determination of those issues invalid. For example, Count I (breach of contract) and Count IV (quiet title) clearly will be affected (and in fact determined) by the outcome of the appeal; Counts V and VI (slander and defamation) have to do with Esposito's claim that Defendants made false statements regarding Esposito (including inferentially statements regarding the ownership of Lot 39, Block 1); and Counts II and III have to do with the Greenbriar Homeowners' purported refusal to sign a document titled "First Supplement", which would have brought 17 residential lots into the Greenbriar Homeowners Association. Esposito asserts that he cannot sell these 17 lots if they are not part of the Association and, therefore, cannot "wait" for an appeal on the issue of ownership. Although Esposito seeks specific

performance of that purported contract as a remedy in this case, it is unclear that he can obtain such relief, and further, the First Supplement contains a provision that states "WHEREAS, Declarant wishes to clarify that Lot 39, Block 1 (also known as the Community Storage Facility) is not a Common Area ..." Page 1 of that document is attached hereto as Exhibit A for the Court's reference. Certainly a determination on the appeal of the issue of ownership affects the validity of the provisions of First Supplement at issue in Counts II and III of Esposito's Complaint, thus a ruling on appeal will affect those claims.

Moreover, the Greenbriar Homeowners have compelling reasons to have the issue of ownership finally resolved, sooner rather than later, for obvious reasons, and for reasons that were discussed by Esposito in his motion for a constructive trust, specifically, that he may seek permission from the Court to enforce his receipt of rent payments outside of the terms of the CCRs, directly from the homeowners and/or may lien the property of the homeowners in Greenbriar for rents purportedly not paid to Esposito by the Association. *See* Affidavit of John Esposito in Support of Motion for Constructive Trust and Turnover Order, ¶¶ 9 and 10. It is the duty of the Greenbriar Homeowners to protect the interest of the individual homeowners, which it cannot effectively do without having a determination on appeal on the issue of ownership of Lot 39, Block 1. Pursuant to Rule 54, there is no just reason for delaying a determination regarding ownership of Lot 39, Block 1 on appeal.

Further, in the interest of judicial economy, the Court should grant certification. In the event the Court denies certification, the case will go forward to trial on issues that are intimately intertwined with the ownership issue. Following trial, the Greenbriar Homeowners would file an appeal of the Court's order regarding ownership, and if appeal comes down in favor of the Greenbriar Homeowners, a second trial will have to take place on the Greenbriar Homeowners'


Counterclaim and several of the claims that were presented at the first trial to which the issue of ownership is relevant; in sum, a re-trial. This is exactly the kind of piecemeal litigation Rule 54(b) is designed to avoid. Certifying the ownership issue will finally resolve a major claim between the parties and will immediately and materially advance orderly resolution of this litigation.

It would be unjust to the Greenbriar Homeowners to force them to delay their exercising their right of appeal. It is within the Court's discretion to grant certification, and given the facts and posture of this case, certification is warranted.

RESPECTFULLY SUBMITTED THIS 16th day of February, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Michelle R. Points, ISB No. 6224

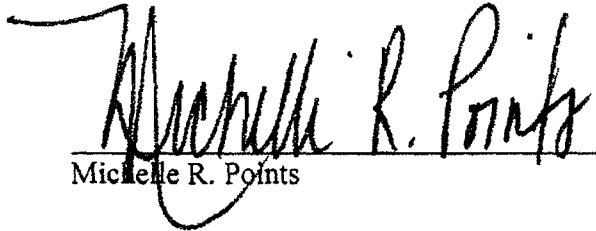
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of February, 2010, I caused to be served a true copy of the foregoing REPLY TO PLAINTIFFS' OPPOSITION TO GREENBRIAR HOMEOWNERS' MOTION FOR RULE 54(B) CERTIFICATE by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Blvd., Suite 790
Boise, ID 83712
[Attorneys for Plaintiff]

☐ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☒ Telecopy: 208.338.3290


Michelle R. Points

REPLY TO PLAINTIFFS' OPPOSITION TO GREENBRIAR
HOMEOWNERS' MOTION FOR RULE 54(b) CERTIFICATE - 6

**FIRST SUPPLEMENT
TO THE DECLARATION OF
COVENANTS, CONDITIONS AND RESTRICTIONS FOR
GREENBRIAR ESTATES SUBDIVISION
(A COMMUNITY FOR PERSONS 55 OR OLDER)**

This First Supplement To The Declaration Of Covenants, Conditions And Restrictions For Greenbriar Estates Subdivision (this "First Supplement") is made this ____ day of _____, 2007, by the undersigned, representing the Declarant and not less than two-thirds (2/3) of the Class A Members.

ARTICLE I: RECITALS

WHEREAS, on October 4, 2005, that certain Declaration of Covenants, Conditions and Restrictions For Greenbriar Estates Subdivision was recorded in the records of Canyon County, Idaho, as Instrument No. 200563819 ("Declaration"); and

WHEREAS, the Declaration contains terms, covenants, conditions and restrictions which govern the use and enjoyment of that certain Property described therein; and

WHEREAS, the Declaration contemplated that an Assisted Living Facility would be built and operated on Lot 52, Block 1 of the Property; and

WHEREAS, for a variety of reasons, the Assisted Living Facility will not be built on, or located within, the Property; and

WHEREAS, Lot 52, Block 1 of the Property is being re-subdivided into eighteen lots, seventeen of which will be Single Family Lots and one will be Common Area; and

WHEREAS, Declarant wishes to clarify that Lot 39, Block 1 (also known as the Community Storage Facility), is not Common Area; and

WHEREAS, the purpose of this First Supplement is to amend the Declaration pursuant to the above described clarification and changes to the Property; and

WHEREAS, pursuant to Article X, Section 3 of the Declaration, the Declaration can be amended by Declarant (assuming Declarant owns one or more Single Family Lots or the Assisted Living Facility) and not less than two-thirds (2/3) of the Class A Members; and

WHEREAS, as of the date hereof, Declarant owns one or more Single Family Lots; and

WHEREAS, on the ____ day of _____, 2007, the Association held a duly called meeting of Class A Members whereby ____ Class A Members, representing ____ % of the Class A Members present, approved this First Supplement.

ARTICLE II: SUPPLEMENT AND AMENDMENT

Section 1. Incorporation of Recitals. The Recitals above are incorporated herein by this reference.

FIRST SUPPLEMENT - 1

**EXHIBIT
A**

PLF00213

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Standard of Review

Certificates of final judgment are governed by I.R.C.P. 54(b). I.R.C.P. 54(b) provides in pertinent part:

When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment upon one or more but less than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of the judgment.

The decision to issue a certificate of final judgment is discretionary with the Court. *Kolln v. Saint Luke's Regional Medical*, 130 Idaho 323, 328, 940 P.2d 1142, 1147 (1997). I.R.C.P. 54(b) certification "should be reserved only for 'the infrequent harsh case.'" *Id.* (quoting *Pichon v. L.J. Broekemeier, Inc.*, 99 Idaho 598, 602, 586 P.2d 1042, 1046 (1978)). "The party requesting certification must show that it will suffer some hardship or injustice, or provide some other compelling reason why the certification should be granted." *Id.* (citation omitted.) Rule 54(b) certification is not intended to abrogate the general rule against piecemeal appeals. *Robertson v. Richards*, 118 Idaho 791, 793, 800 P.2d 678, 680 (Idaho Ct.App., 1990).

In order for a partial judgment to be certified as final and appealable under Rule 54(b), the order granting partial judgment must finally resolve one or more of the claims between the parties. *Toney v. Coeur D'Alene School Dist. No. 271*, 117 Idaho 785, 786, 792 P.2d 350, 351 (1990). If it does not, then it is error for a trial court to certify any interlocutory order as final under I.R.C.P. 54(b). *Id.* Where there is only one claim in a case, partial resolution of that claim is an insufficient ground for the issuance of a certificate of final judgment. *See Glacier General Assur. Co. v. Hisaw*, 103 Idaho 605, 608, 651 P.2d 539, 542 (1982) (holding that when a district court grants partial summary judgment fixing liability but leaving for trial the issue of damages this does not dispose of the one claim involved in this case.)

Analysis

In this case, defendants argue that there is no just reason for delaying final judgment on the issues settled by the Court's ruling on plaintiffs' motion for partial summary judgment. Specifically, that an appeal regarding ownership and control of Lot 39, Block 1, addresses the controlling question of law and furthers resolution of all claims at issue. Further, that although

there is more than one claim for relief presented in this action, all other claims are peripheral to that sole issue.

Moreover, defendants argue that they will suffer hardship and injustice if certification is not made. In particular, that Esposito has indicated his intent to enforce his receipt of rent payments outside the terms of the CC&Rs, directly from the homeowners and/or may lien the property of the homeowners for rents.

Plaintiffs respond by asserting that although the ownership of Lot 39, Block 1, is an important issue for determination between the parties, it is far from the only issue in the case. Further, Plaintiffs assert that there is not a final resolution of any one count or claim between the parties as required by I.R.C.P. 54(b). This is not true, as the defendants correctly point out, the Court's finding on the issue of the ownership of Lot 39, Block 1 in the Greenbriar Estates Subdivision is dispositive as to the defendants' counterclaims. Indeed, the Court has dismissed the defendants' counterclaims in their entirety.

Counts II, III, IV and V relate to conflict between the developer plaintiffs and the HOA over a change in the development of Greenbriar Estates Nos. 2 & 3. The plaintiffs claim that the HOA is preventing them from changing the original plan for the development of a one hundred twenty (120) room assisted living facility to a smaller forty-five (45) room assisted living facility on property that plaintiff Esposito owns adjacent to Greenbriar Estates subdivision and converting the original assisted living facility lot into seventeen (17) single family lots. According to paragraph 65 of plaintiffs' Complaint, the Nampa City Council denied approval for that project.

The lynchpin of the defendants' case is its claim that plaintiff Esposito committed fraud by intentionally misleading the City of Nampa, Planning and Zoning Department and the City Council when he submitted to them a plat that was inconsistent with what he was disclosing to the purchasers of lots in the subdivision. The plat submitted for approval clearly set out that Lot 39, intended for storage units, was common area. He did not disclose to the city that his true intention was to retain private ownership of Lot 39 and collect rent from the homeowners through the HOA. In their affidavits, the city officials unanimously state they would not have approved this subdivision had they known Esposito's true intention. In its memorandum decisions on the motion for partial summary judgment and upon the motion to reconsider, this Court focused upon the issue of common law dedication in the recording of the plat. The

equitable principle underlying common law dedication is protecting the interests of buyers who rely upon what they are told will be dedicated as common area. This Court could not find that Esposito made any misrepresentation to the buyers. Rather, his disclosure to them was that he would privately own Lot 39 and collect rent for the storage units. However, if this Court erred in its ruling and the allegation of fraudulent conduct by Esposito is a question of fact to be determined by the jury, this Court finds that it will be inextricably intertwined with the claims of the plaintiffs and the defenses presented by the defendants on all counts of the Complaint.

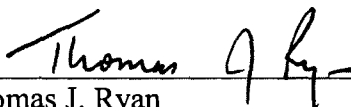
Thus, it appears to this Court that the gravamen of this lawsuit is the issue of ownership of Lot 39, Block 1 of the Greenbriar Estates subdivision. It is the Court's opinion that the entry of final judgment upon the claims raised in Defendants' Counterclaims is appropriate at this time. The Court further finds that there is no just reason for delay.

Accordingly,

RULE 54(b) CERTIFICATE

With respect to the issues determined by the Court's judgment and order granting summary judgment on the sole issue of ownership of Lot 39, Block 1 of the Greenbriar Estates Subdivision and dismissing defendants' counterclaims signed January 22, 2010, it is hereby CERTIFIED, in accordance with Rule 54 (b), I.R.C.P., that the court has determined that there is no just reason for delay of the entry of a final judgment and that the court has and does hereby direct that the aforementioned judgment and order shall be a final judgment upon which execution may issue and an appeal may be taken as provided by the Idaho Appellate Rules.

Dated this 12th day of March, 2010.




Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision Upon Defendants' Motion for Rule 54(b) Certificate was mailed, postage prepaid, to the following persons on this 12 day of March, 2010.

DAVID M. PENNY
COSHO HUMPREY, LLP
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518

MICHELLE R. POINTS
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617

By: 
Deputy Clerk

MAR 12 2010

**CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited)	
liability company; and JOHN ESPOSITO,)	
an individual,)	
	)	CASE NO. CV 2008-9740
Plaintiffs/Counterdefendants,)	
	)	MEMORANDUM DECISION UPON
vs.	)	PLAINTIFFS' MOTION FOR
	)	CONSTRUCTIVE TRUST AND
	)	TURNOVER ORDER
GREENBRIAR ESTATES)	
HOMEOWNERS' ASSOCIATION, INC.,)	
an Idaho non-profit corporation; DEBRA)	
HOBBS a/k/a DEBBIE HOBBS, an)	
Individual d/b/a ACTION ASSOCIATION)	
MANAGEMENT COMPANY,)	
)	
Defendants/Counterclaimants.)	

This matter came before the Court for hearing on February 18, 2010 upon Plaintiffs' Motion for Constructive Trust and Turnover Order. Appearing on behalf of the plaintiffs was David M. Penny. Appearing on behalf of the defendants was Michelle R. Points. The Court has considered the oral arguments of counsel and the briefing submitted by the parties. The Court's memorandum opinion is set forth below.

Procedural History

On September 21, 2009, this Court entered its Memorandum Decision granting summary judgment on the sole issue of ownership of Lot 39, Block 1 of the Greenbriar Estates Subdivision and dismissing the Counterclaims of the defendants. Count I of Plaintiffs' Complaint is a cause of action for breach of contract, specifically, failure to pay rent for a storage facility as required by the CC&Rs. The dispute over the payment of rent was based upon a difference of opinion as to whether the plaintiffs or the defendant Greenbriar Estates Homeowners' Association (hereinafter

HOA) owned the lot and storage facility. In deciding the ownership issue re: the lot and storage facility, the Court did not decide the validity of any of the other affirmative defenses asserted by the defendants in their Amended Answer. The Plaintiffs allege and Defendants admit that the HOA has continued to collect the regular assessments from the homeowners, including the portion that per the CC&Rs is designated for rent of a storage unit. Plaintiffs now seek an order from this Court imposing a constructive trust on all assessments collected from February 1, 2008 to the present and collected in the future during the pendency of this action. The defendants asked the Court to reconsider its decision. This was briefed and argued and the Court filed a Memorandum Decision on the Motion to Reconsider on December 4, 2009 affirming its earlier decision. An order granting partial summary judgment and dismissing defendants' counterclaims was entered on January 22, 2010.

The defendants have filed a motion for Rule 54(b) certification of the Court's order. The Court entered its Order granting Defendants' motion contemporaneously herewith.

Standard of Review

Plaintiffs' motion asks that this Court impose a constructive trust on assessments collected by the HOA, both prior to and during the pendency of this action. A constructive trust is an equitable remedy that arises where legal title to property has been obtained through actual fraud, misrepresentations, concealments, taking advantage of one's necessities, or under circumstances otherwise rendering it unconscionable for the holder of legal title to retain beneficial interest in the property. *Witt v. Jones*, 111 Idaho 165, 168-169, 722 P.2d 474, 477-478 (1986), citing *Davenport v. Burke*, 30 Idaho 599, 167 P. 481 (1917). "A constructive trust is a remedial device created primarily to prevent unjust enrichment; equity compels the restoration to another of property to which the holder thereof is not justly entitled." *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho 591, 593, 790 P.2d 372, 374 (Ct. App. 1989) (citation omitted).

There must be clear, cogent, convincing evidence to give rise to a resulting or constructive trust. *Erb v. Kohnke*, 121 Idaho 328, 335, 824 P.2d 903, 910 (Ct. App. 1992) (citations omitted).

"As a general rule, a constructive trust grows out of fraud or confidential or fiduciary relations existing between the parties." *Hanger v. Hess*, 49 Idaho 325, 288 P. 160, 161 (1930). In addition, a constructive trust may arise if any party obtains legal title to property in "any other

unconscientious manner, so that he cannot equitably retain the property which really belongs to another ... ". *Id.* "The only problem of great importance in the field of constructive trusts is to decide whether, in the numerous and varying fact situations presented to the courts, there is a wrongful holding of property and hence a potential unjust enrichment of the defendant." *Chinchurreta v. Evergreen Management, Inc.*, 117 Idaho at 593, 790 P.2d at 374 (citation omitted).

Analysis

In this case, Plaintiffs argue that a constructive trust should be imposed on the assessments collected by the HOA because Plaintiffs have a contractual right to the storage rent portion of the assessments and the rent is being wrongfully withheld. Specifically, that the CC&Rs are a contract between the plaintiffs and the homeowners, that the CC&Rs provide for the payment of rent for the use of the storage facility, that the HOA has continued to collect the rent portion of the assessments, and that HOA has failed to convey the paid rents to the plaintiffs as required by the CC&Rs. Plaintiffs claim that a constructive trust is necessary to preserve the rental payments previously made and continuing into the future until the resolution of this case.

In response, Defendants argue that although the Court has determined that Plaintiffs are the owners of Lot 39, Block 1, the Court has specifically reserved judgment on the applicability of the other affirmative defenses and the issue of damages with respect to Count I of Plaintiffs' Complaint, breach of contract. Absent a determination regarding damages, the imposition of a constructive trust on the funds held by HOA is premature and unwarranted under the facts of this case. Defendants stress the fact that absent a judgment on the issue of damages, the breach of contract claim, to which there are numerous affirmative defenses, is unresolved and that to set aside the funds at this time would be an extraordinary remedy.

The Court has previously held that legal title to Lot 39, Block 1 is vested in the plaintiffs. In so holding, the Court has not fully addressed Count I of the Complaint. Count I of the Complaint is a breach of contract cause of action alleging that HOA has breached the terms of the Greenbriar Estates CC&Rs and the HOA's contract with Asbury Park by failing to timely collect and remit payments for the storage units. The Court has not addressed the applicability of some of the affirmative defenses, nor have damages been determined.

The rule articulated in *Chinchurreta*, instructs this Court to look for wrongful holding of property and hence a potential unjust enrichment of the defendant. This Court cannot find that there is a danger of unjust enrichment. In the event that plaintiffs ultimately prevail, there is no evidence in the record that the plaintiffs would have an uncollectable judgment. It seems unlikely to this Court that the HOA, comprised of approximately ninety-six (96) members would not ultimately be able to meet any judgment that may be rendered against it for unpaid rents for storage units, plus interest. Thus, the court finds that the equitable remedy of a constructive trust is not needed in this instance.

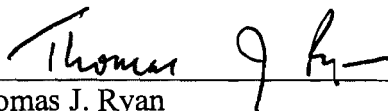
As the Court cannot find that a constructive trust should be created in this case, a turnover order as sought by the plaintiffs need not be addressed.

Therefore,

ORDER

IT IS HEREBY ORDERED, and this does ORDER, that plaintiffs' motion for a constructive trust and turnover order is DENIED.

Dated this 12th day of March, 2010.



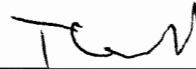
Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Memorandum Decision Upon Plaintiffs' Motion for Constructive Trust and Turnover Order was mailed, postage prepaid, to the following persons on this 12 day of March, 2010.

DAVID M. PENNY
COSHO HUMPHREY, LLP.
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518

MICHELLE R. POINTS
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617

By: 
Deputy Clerk

8 **E I L E D**
A.M. P.M.

MAR 26 2010

CANYON COUNTY CLERK
T. CRAWFORD, DEPUTY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation; DEBRA HOBBS a/k/a DEBBIE
HOBBS, an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

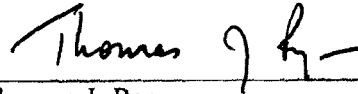
Case No. CV 08-9740

FINAL JUDGMENT

Based upon this Court's ruling in granting Plaintiffs' Motion for Partial Summary Judgment based on its finding that there was no issue of material fact that Plaintiff Asbury Park, LLC is the owner of Lot 39, Block 1 of the Greenbriar Estates Subdivision, and good cause appearing therefor, the Court hereby enters judgment as follows:

Plaintiff Asbury Park, LLC's is the fee simple owner of Lot 39, Block 1, which lot and block is not subject to any ownership right or interest by the Greenbriar Estates Homeowners' Association, Inc.

DATED THIS 25th day of March, 2010.



Thomas J. Ryan
District Judge

CLERK'S CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 26 day of March, 2010, I caused to be served a true copy of the foregoing FINAL JUDGMENT by the method indicated below, and addressed to each of the following:


David M. Penny
COSHO HUMPHREY, LLP
800 Park Boulevard, Suite 790
P.O. Box 9518
Boise, ID 83707-9518
[Attorneys for Plaintiff]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290

Michelle R. Points
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
[Attorneys for Defendants/Counterclaimants]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.954.5252

WILLIAM H. HURST
Clerk of the Court

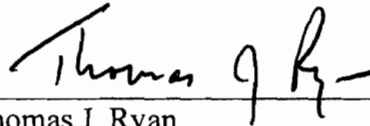
By 
Deputy Clerk

Based upon this Court's ruling in granting Plaintiffs' Motion for Partial Summary Judgment, and good cause appearing therefore, the Court hereby enters judgment as follows:

JUDGMENT IS ENTERED AGAINST Defendant Greenbriar Estates Homeowners' Association and in favor of Plaintiff Asbury Park, LLC, and the Counterclaims of the Greenbriar Estates Homeowners' Association are dismissed.

JUDGMENT IS FURTHER ENTERED IN FAVOR of Plaintiff Asbury Park, LLC, affirming that it is the fee simple owner of Lot 39, Block 1, which lot and block is not subject to any ownership right or interest by the Greenbriar Estates Homeowners' Association, Inc.

DATED THIS 30th day of March, 2010.

A handwritten signature in black ink, appearing to read "Thomas J. Ryan", is written over a horizontal line.

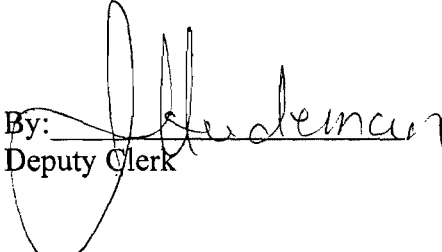
Thomas J. Ryan
District Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Amended Final Judgment was mailed, postage prepaid, to the following persons on this 31 day of March 2010.

DAVID M. PENNY
COSHO HUMPHREY, LLP.
800 Park Blvd., Ste. 790
P.O. Box 9518
Boise, ID 83707-9518

MICHELLE R. POINTS
HAWLEY TROXELL ENNIS & HAWLEY, LLP
877 Main St., Ste. 1000
P.O. Box 1617
Boise, ID 83701-1617

By: 
Deputy Clerk

FILED
1145 A.M. P.M.

MAR 31 2010

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Respondents/
Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation,

Appellant/
Defendant/Counterclaimant,

and

DEBRA HOBBS a/k/a DEBBIE HOBBS, an
individual d/b/a ACTION ASSOCIATION
MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, Asbury Park, LLC and John Esposito AND THEIR ATTORNEYS OF RECORD Cosho Humphrey, LLP, 800 Park Boulevard, Suite 790, P.O. Box 9518, Boise, Idaho 83707-9518, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant Greenbriar Estates Homeowners' Association, Inc. ("Appellant"), appeals against the above-named Respondents to the Idaho Supreme Court, the following Orders and Judgment entered by the District Court by the Honorable Thomas J. Ryan in this case: (1) The Memorandum Decision on Plaintiffs' Motion for Partial Summary Judgment, entered September 21, 2009, wherein the District Court granted Respondents' Motion for Partial Summary Judgment, holding that there was no issue of material fact that Respondent Asbury Park, LLC was the fee simple owner of Lot 39, Block 1 of the Greenbriar Estates Subdivision, which lot and block is not subject to any ownership right or interest by the Appellant Greenbriar Estates Homeowners' Association; (2) the Memorandum Decision Upon Defendants' Motion for Reconsideration, entered December 4, 2009, wherein the District Court denied Appellant's Motion for Reconsideration; (3) the Order on Plaintiffs' Motion for Summary Judgment, entered January 22, 2010, wherein the District Court confirmed its earlier rulings on Respondents' Motion for Partial Summary Judgment; and the Final Judgment, entered May 26, 2010.

2. That Appellant has a right to appeal to the Idaho Supreme Court, and the District Court's Decisions referred to in paragraph 1 are appealable under and pursuant to Idaho Appellate Rule 11(a)(3), as the District Court issued a Rule 54(b) Certificate on March 12, 2010, regarding its decision granting Respondents' Motion for Partial Summary Judgment.

3. The Appellant requests a review of the District Court's rulings as identified in paragraph 1 above.

4. No order has been entered sealing all or any portion of the record.
5. The Appellant requests the preparation of the following portions of the reporter's transcript:
 - a. The reporter's transcript for the motion hearing held on August 20, 2009.
 - b. The reporter's transcript for the motion hearing held on November 19, 2009.
6. The Appellant requests the following documents be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28:
 - a. Plaintiffs' Motion for Partial Summary Judgment, entered June 19, 2009;
 - b. Plaintiffs' Memorandum, entered June 19, 2009;
 - c. Statement of Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment, entered June 19, 2009;
 - d. Affidavit of John Esposito in Support of Motion for Partial Summary Judgment, entered June 19, 2009;
 - e. Affidavit of Gregory G. Carter, entered June 19, 2009;
 - f. Defendant/Counterclaimant's Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment, entered August 6, 2009;
 - g. Affidavit of Aaron Randell, entered August 6, 2009;
 - h. Affidavit of Paul Pelletier, entered August 6, 2009;
 - i. Affidavit of Michelle R. Points, entered August 6, 2009;
 - j. Affidavit of Kathy Kinney, entered August 6, 2009;
 - k. Affidavit of Sula Wasbrough, entered August 6, 2009;

l. Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment, entered August 13, 2009;

m. Affidavit of John Esposito, entered August 13, 2009;

n. Memorandum Decision on Plaintiffs' Motion for Partial Summary Judgment, entered September 21, 2009;

o. Motion for Reconsideration, entered October 5, 2009;

p. Memorandum in Support of Motion for Reconsideration, entered October 5, 2009;

q. Affidavit of Pam White, entered October 5, 2009;

r. Affidavit of Rodney Emery, entered October 5, 2009;

s. Affidavit of Norman Holm, entered October 5, 2009;

t. Affidavit of Sheila Keim, entered October 5, 2009;

u. Affidavit of John Priester, entered October 5, 2009;

v. Affidavit of Chris Veloz, entered October 5, 2009;

w. Affidavit of Martin Thorne, entered October 5, 2009;

x. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Reconsideration, entered November 10, 2009;

y. Defendant/Counterclaimant Greenbriar Estates Homeowners' Association, Inc.'s Memorandum in Reply to Plaintiffs' Opposition to Its Motion for Reconsideration (fax), entered November 17, 2009;

z. Memorandum Decision Upon Defendants' Motion for Reconsideration, entered December 4, 2009;

aa. Order on Plaintiffs' Motion for Summary Judgment, entered January 22, 2010; and

bb. Memorandum Decision Upon Defendants' Motion for 54(b) Certificate and Certification, entered March 12, 2010.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the court reporter.

b. That the Clerk of the District Court has been paid the estimated fee for the preparation of the court record and reporter's transcript.

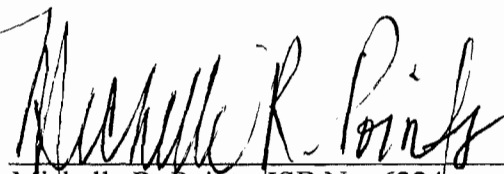
c. That the appellate filing fee has been paid.

d. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED THIS 30th day of March, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By



Michelle R. Points, ISB No. 6224

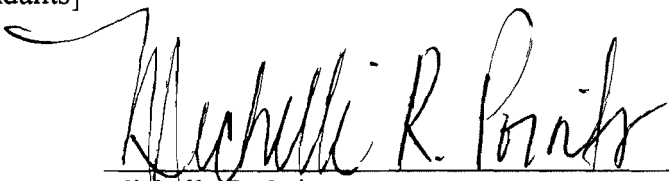
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 30th day of March, 2010, I caused to be served a true copy of the foregoing NOTICE OF APPEAL by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Boulevard, Suite 790
P.O. Box 9518
Boise, ID 83707-9518
[Attorneys for
Respondents/Plaintiffs/Counterdefendants]

☐ U.S. Mail, Postage Prepaid
☒ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290



Michelle R. Points

Michelle R. Points, ISB No. 6224
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5252
Email: mpoints@hawleytroxell.com

Attorneys for Defendants/Counterclaimants

F I L E D
11:20 A.M. P.M.

APR 06 2010

**CANYON COUNTY CLERK
D. BUTLER, DEPUTY**

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Respondents/
Plaintiffs/Counterdefendants,

vs.

GREENBRIAR ESTATES HOMEOWNERS'
ASSOCIATION, INC., an Idaho non-profit
corporation,

Appellant/
Defendant/Counterclaimant,

and

DEBRA HOBBS a/k/a DEBBIE HOBBS, an
individual d/b/a ACTION ASSOCIATION
MANAGEMENT COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740

AMENDED NOTICE OF APPEAL

TO: THE ABOVE NAMED RESPONDENTS, Asbury Park, LLC and John Esposito AND THEIR ATTORNEYS OF RECORD Cosho Humphrey, LLP, 800 Park Boulevard, Suite 790, P.O. Box 9518, Boise, Idaho 83707-9518, AND THE CLERK OF THE ABOVE ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant Greenbriar Estates Homeowners' Association, Inc. ("Appellant"), appeals against the above-named Respondents to the Idaho Supreme Court, the following Orders and Judgment entered by the District Court by the Honorable Thomas J. Ryan in this case: (1) The Memorandum Decision on Plaintiffs' Motion for Partial Summary Judgment, entered September 21, 2009, wherein the District Court granted Respondents' Motion for Partial Summary Judgment, holding that there was no issue of material fact that Respondent Asbury Park, LLC was the fee simple owner of Lot 39, Block 1 of the Greenbriar Estates Subdivision, which lot and block is not subject to any ownership right or interest by the Appellant Greenbriar Estates Homeowners' Association; (2) the Memorandum Decision Upon Defendants' Motion for Reconsideration, entered December 4, 2009, wherein the District Court denied Appellant's Motion for Reconsideration; (3) the Order on Plaintiffs' Motion for Summary Judgment, entered January 22, 2010, wherein the District Court confirmed its earlier rulings on Respondents' Motion for Partial Summary Judgment; the Final Judgment, entered May 26, 2010, and the Amended Final Judgment, entered March 31, 2010.

2. That Appellant has a right to appeal to the Idaho Supreme Court, and the District Court's Decisions referred to in paragraph 1 are appealable under and pursuant to Idaho Appellate Rule 11(a)(3), as the District Court issued a Rule 54(b) Certificate on March 12, 2010, regarding its decision granting Respondents' Motion for Partial Summary Judgment.

3. The Appellant requests a review of the District Court's rulings as identified in paragraph 1 above.

4. No order has been entered sealing all or any portion of the record.
5. The Appellant requests the preparation of the following portions of the reporter's transcript:
 - a. The reporter's transcript for the motion hearing held on August 20, 2009.
 - b. The reporter's transcript for the motion hearing held on November 19, 2009.
6. The Appellant requests the following documents be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28:
 - a. Plaintiffs' Motion for Partial Summary Judgment, entered June 19, 2009;
 - b. Plaintiffs' Memorandum, entered June 19, 2009;
 - c. Statement of Undisputed Facts in Support of Plaintiffs' Motion for Partial Summary Judgment, entered June 19, 2009;
 - d. Affidavit of John Esposito in Support of Motion for Partial Summary Judgment, entered June 19, 2009;
 - e. Affidavit of Gregory G. Carter, entered June 19, 2009;
 - f. Defendant/Counterclaimant's Response to Plaintiffs/Counterdefendants' Motion for Partial Summary Judgment, entered August 6, 2009;
 - g. Affidavit of Aaron Randell, entered August 6, 2009;
 - h. Affidavit of Paul Pelletier, entered August 6, 2009;
 - i. Affidavit of Michelle R. Points, entered August 6, 2009;
 - j. Affidavit of Kathy Kinney, entered August 6, 2009;
 - k. Affidavit of Sula Wasbrough, entered August 6, 2009;

l. Plaintiffs' Reply Memorandum in Support of Motion for Partial Summary Judgment, entered August 13, 2009;

m. Affidavit of John Esposito, entered August 13, 2009;

n. Memorandum Decision on Plaintiffs' Motion for Partial Summary Judgment, entered September 21, 2009;

o. Motion for Reconsideration, entered October 5, 2009;

p. Memorandum in Support of Motion for Reconsideration, entered October 5, 2009;

q. Affidavit of Pam White, entered October 5, 2009;

r. Affidavit of Rodney Emery, entered October 5, 2009;

s. Affidavit of Norman Holm, entered October 5, 2009;

t. Affidavit of Sheila Keim, entered October 5, 2009;

u. Affidavit of John Priester, entered October 5, 2009;

v. Affidavit of Chris Veloz, entered October 5, 2009;

w. Affidavit of Martin Thorne, entered October 5, 2009;

x. Plaintiffs' Memorandum in Opposition to Defendant's Motion for Reconsideration, entered November 10, 2009;

y. Defendant/Counterclaimant Greenbriar Estates Homeowners' Association, Inc.'s Memorandum in Reply to Plaintiffs' Opposition to Its Motion for Reconsideration (fax), entered November 17, 2009;

z. Memorandum Decision Upon Defendants' Motion for Reconsideration, entered December 4, 2009;

aa. Order on Plaintiffs' Motion for Summary Judgment, entered January 22, 2010; and

bb. Memorandum Decision Upon Defendants' Motion for 54(b) Certificate and Certification, entered March 12, 2010.

7. I certify:

a. That a copy of this Notice of Appeal has been served on the court reporter.

b. That the Clerk of the District Court has been paid the estimated fee for the preparation of the court record and reporter's transcript.

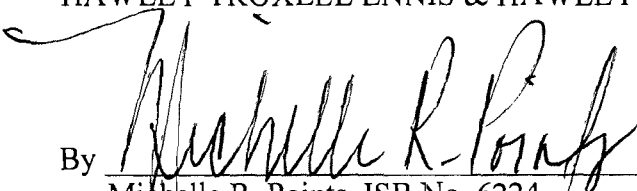
c. That the appellate filing fee has been paid.

d. That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED THIS 2nd day of April, 2010.

HAWLEY TROXELL ENNIS & HAWLEY LLP

By


Michelle R. Points, ISB No. 6224

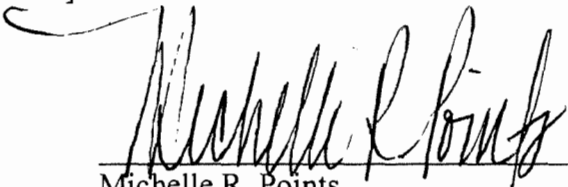
Attorneys for Defendants/Counterclaimants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of April, 2010, I caused to be served a true copy of the foregoing AMENDED AMENDED NOTICE OF APPEAL by the method indicated below, and addressed to each of the following:

David M. Penny
COSHO HUMPHREY, LLP
800 Park Boulevard, Suite 790
P.O. Box 9518
Boise, ID 83707-9518
[Attorneys for
Respondents/Plaintiffs/Counterdefendants]

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ E-mail
☐ Telecopy: 208.338.3290



Michelle R. Points

FILED
1140 A.M. P.M.

APR 16 2010

CANYON COUNTY CLERK
J HEIDEMAN, DEPUTY

DAVID M. PENNY ISB #3631
COSHO HUMPHREY, LLP
800 PARK BLVD., STE. 790
BOISE, ID 83712
PO BOX 9518
BOISE, ID 83707-9518
Telephone (208) 344-7811
Facsimile (208) 338-3290

Attorneys for Plaintiffs

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF
THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC, an Idaho limited
liability company; and JOHN ESPOSITO,
an individual,

Cross-Appellants/Respondents/
Plaintiffs/Counterdefendants,

v.

GREENBRIAR ESTATES
HOMEOWNERS' ASSOCIATION, INC.,
an Idaho non-profit corporation,

Cross-Respondent/Appellant/
Defendant/Counterclaimant,

And

DEBREA HOBBS ak/a DEBBIE HOBBS,
an individual d/b/a ACTION
ASSOCIATION MANAGEMENT
COMPANY,

Defendants/Counterclaimants.

Case No. CV 08-9740*C

NOTICE OF CROSS-APPEAL

ORIGINAL

000469

TO: APPELLANT/CROSS-RESPONDENT, GREENBRIAR ESTATES HOMEOWNERS' ASSOCIATION, INC., and its attorneys of record, HAWLEY TROXELL ENNIS & HAWLEY, LLP, 877 Main Street, Suite 1000, P.O. Box 1617, Boise, Idaho 83701-1617; AND THE CLERK OF THE ABOVE-ENTITLED COURT

NOTICE IS HEREBY GIVEN THAT:

1. The above named Cross-Appellants, Asbury Park, LLC and John Esposito ("Cross-Appellants"), appeal against the above named Cross-Respondents to the Idaho Supreme Court from the Memorandum Decision Upon Defendants Motion for 54(b) Certificate, the Certification entered in the above entitled action on the 12th day of March, 2010, the Honorable Thomas J. Ryan presiding, the Final Judgment entered March 26, 2010, and the Amended Final Judgment entered March 31, 2010.

2. Cross-Appellants have a right to appeal to the Idaho Supreme Court, and the District Court's Decisions referred to in Paragraph 1 are appealable under and pursuant to Idaho Appellate Rule 11(a)(3).

3. The issues on appeal which the Cross-Appellants intend to assert in this appeal are as follows:

a) Whether the District Court erred by granting the Appellant/Cross-Respondent's Motion for Rule 54(b) Certification.

b) Whether Respondent/Cross-Appellant is entitled to an award of attorney's fees and costs on appeal.

4. The Cross-Appellants request the preparation of the following portions of the reporter's transcript:

- a) The reporter's standard transcript for the motion hearing held on February 18, 2010 in hard copy and electronic format.

5. No order has been entered sealing all or any portion of the record.

6. Cross-Appellants request the following documents be included in the clerk's record in addition to those automatically included under Idaho Appellate Rule 28:

- a) Affidavit of Jared Sherburne, entered June 19, 2009.
- b) Affidavit of Mike E. Pearson, entered June 19, 2009.
- c) Affidavit of Chandra Thornquist, entered June 19, 2009.
- d) Affidavit of Debra Hobbs, entered August 6, 2009.
- e) Plaintiffs' Motion to Strike Portions of Affidavits Filed by Defendants, entered August 13, 2009.
- f) Plaintiffs' Memorandum in Support of Motion to Strike Portions of Affidavits Filed by Defendants Pursuant to I.R.C.P. 56(e), entered August 13, 2009.
- g) Opposition to Plaintiffs' Motion to Strike, entered August 17, 2009.
- h) Plaintiffs' Reply Memorandum in Support to Motion to Strike Portions of Affidavits Filed by Defendants, entered August 18, 2009.

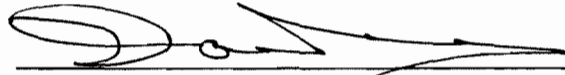
- i) Affidavit of David M. Penny in Support of Entry of Order Granting Plaintiffs' Motion for Partial Summary Judgment, entered October 7, 2009.
- j) Motion for Rule 54(b) Certificate, entered January 11, 2010
- k) Memorandum in Support of Motion for Rule 54(b) Certificate, entered January 11, 2010.
- l) Rule 54(b) Certificate (proposed), entered January 11, 2010.
- m) Plaintiffs' Memorandum in Opposition to Defendants' Motion for Rule 54(b) Certificate, entered February 10, 2010.
- n) Reply to Plaintiffs' Opposition to Greenbriar Homeowners' Motion for Rule 54(b) Certificate, entered February 16, 2010.

7. I certify:

- a) That a copy of this Notice of Cross-Appeal has been served on the court reporter;
- b) That the Clerk of the District Court has been paid the estimated fee for the preparation of the court record and reporter's transcript.
- c) That the cross-appellate filing fee has been paid.
- d) That service has been made upon all parties required to be served pursuant to Idaho Appellate Rule 20.

DATED this 14 day of April, 2010.

COSHO HUMPHREY, LLP

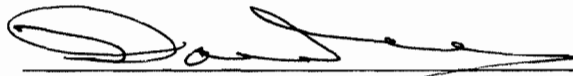


DAVID M. PENNY
Attorneys for Cross-Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 14 day of April, 2010, a true and correct copy of the within and foregoing instrument was served upon:

Michelle Renae Points
Hawley Troxell Ennis & Hawley, LLP
P. O. Box 1617
Boise, ID 83701-1617
Served by: U.S. Mail



DAVID M. PENNY

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC., etal.,)	
)	
Plaintiffs-Counterdefendants-)	
Respondents-Cross-Appellants,	)	Case No. CV-08-09740*C
)	
-vs-	)	CERTIFICATE OF
	)	EXHIBIT
GREENBRIAR ESTATES HOMEOWNER'S)	
ASSOCIATION, INC., etal.,)	
)	
Defendant-Counterclaimant-)	
Appellant-Cross-Respondent,)	
And)	
)	
DEBRA HOBBS, etal.,)	
)	
Defendants-Counterclaimants.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of
the State of Idaho, in and for the County of Canyon, do hereby certify that the following
is being sent as an exhibit:

NONE

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of
the said Court at Caldwell, Idaho this 23 day of June, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By: W. H. Hurst Deputy

CERTIFICATE OF EXHIBIT

000474

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC., etal.,)	
)	
Plaintiffs-Counterdefendants-	)	Case No. CV-08-09740*C
Respondents-Cross-Appellants,)	
)	
-vs-	)	CERTIFICATE OF CLERK
)	
GREENBRIAR ESTATES HOMEOWNER'S)	
ASSOCIATION, INC., etal.,)	
)	
Defendant-Counterclaimant-)	
Appellant-Cross-Respondent,)	
And)	
)	
DEBRA HOBBS, etal.,)	
)	
Defendants-Counterclaimants.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that the above and foregoing Record in the above entitled cause was compiled and bound under my direction as, and is a true, full correct Record of the pleadings and documents under Rule 28 of the Idaho Appellate Rules, including specific documents requested.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 23 day of June, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF CLERK

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

ASBURY PARK, LLC., etal.,)	
)	
Plaintiffs-Counterdefendants-)	
Respondents-Cross-Appellants,	)	Case No. CV-08-09740*C
)	
-vs-	)	CERTIFICATE OF
	)	SERVICE
GREENBRIAR ESTATES HOMEOWNER'S)	
ASSOCIATION, INC., etal.,)	
)	
Defendant-Counterclaimant-)	
Appellant-Cross-Respondent,)	
And)	
)	
DEBRA HOBBS, etal.,)	
)	
Defendants-Counterclaimants.)	

I, WILLIAM H. HURST, Clerk of the District Court of the Third Judicial District of the State of Idaho, in and for the County of Canyon, do hereby certify that I have personally served or had delivered by United State' mail, postage prepaid, one copy of the Clerk's Record and one copy of the Reporter's Transcript to the attorney of record:

Michelle R. Points, P. O. Box 1617, Boise, Idaho 83701-1617

David M. Penny, P. O. Box 9518, Boise, Idaho 83707-9518

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said Court at Caldwell, Idaho this 23 day of June, 2010.

WILLIAM H. HURST, Clerk of the District
Court of the Third Judicial
District of the State of Idaho,
in and for the County of Canyon.

By:  Deputy

CERTIFICATE OF SERVICE